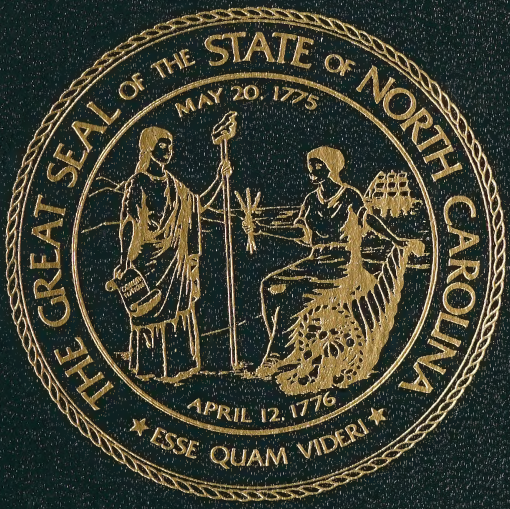
# GENERAL STATUTES OF NORTH CAROLINA

## ANNOTATED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# GENERAL STATUTES OF NORTH CAROLINA

## ANNOTATED

## Volume 19

### NC Constitution
### US Constitution
### Tables

*Prepared Under the Supervision of*
THE DEPARTMENT OF JUSTICE
OF THE STATE OF NORTH CAROLINA
*by*
*The Editorial Staff of the Publisher*

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# Preface

This volume contains the general laws of a permanent nature enacted by the General Assembly through the 2009 Regular Session that are within the Constitution of North Carolina, and the Constitution of the United States, and brings to date the annotations included therein. It also includes a table of the general laws enacted by the General Assembly through the 2005 Session, a Table of Comparable Sections for the Consolidated Statutes to the General Statutes, and a Table of Comparable Sections for the 1868 Constitution to the 1970 Constitution.

A majority of the Session Laws are made effective upon becoming law, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 60 days after the adjournment of the session" in which passed.

A ready reference index is included at the back of this volume. This index is intended to give the user a quick reference to larger bodies of statutes within this volume only. For detailed research on any subject, both within this volume and the General Statutes as a whole, see the General Index to the General Statutes.

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, selected opinions which construe a specific statute are cited in the annotations to that statute. For a copy of an opinion or of its headnotes, write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

This recompiled volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any suggestions they may have for improving the General Statutes to the Department, or to LexisNexis, Charlottesville, Virginia.

Roy Cooper
*Attorney General*

# Scope of Volume

**Statutes:**

Permanent portions of the General Laws enacted by the General Assembly through the 2009 Regular Session affecting the Constitution of North Carolina and the Constitution of the United States.

**Annotations:**

This publication contains annotations taken from decisions of the North Carolina Supreme Court, decisions of the North Carolina Court of Appeals, and decisions of the appropriate federal courts posted through September 18, 2009. These cases will be printed in the following reporters:

South Eastern Reporter 2nd Series.
Federal Reporter 3rd Series.
Federal Supplement 2nd Series.
Federal Rules Decisions.
Bankruptcy Reports.
Supreme Court Reporter.

Additionally, annotations have been taken from the following sources:

North Carolina Law Review.
Wake Forest Law Review.
Campbell Law Review.
Duke Law Journal.
North Carolina Central Law Journal.
Opinions of the Attorney General.

# User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1 for the complete User's Guide.

# Abbreviations

(The abbreviations below are those found in the General Statutes that refer to prior codes.)

| | |
|---|---|
| P.R. | Potter's Revisal (1821, 1827) |
| R.S. | Revised Statutes (1837) |
| R.C. | Revised Code (1854) |
| C.C.P. | Code of Civil Procedure (1868) |
| Code | Code (1883) |
| Rev. | Revisal of 1905 |
| C.S. | Consolidated Statutes (1919, 1924) |

# STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

*December 2009*

I, Roy Cooper, Attorney General of North Carolina, do hereby certify that the foregoing 2009 Replacement Code to the General Statutes of North Carolina was prepared and published by LexisNexis under the supervision of the Department of Justice of the State of North Carolina.

ROY COOPER
*Attorney General of North Carolina*

# Constitution of North Carolina

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**History.** — Session Laws 1969, c. 1258, proposed a complete editorial revision of the Constitution of North Carolina, to be submitted to the qualified voters of the State at the 1970 general election. The revised Constitution was adopted by vote of the people at the general election held Nov. 3, 1970, to take effect July 1, 1971. In addition to the new Constitution, six other constitutional amendments were submitted to the voters at the 1970 general election, to be voted on independently, and five of these were adopted. The effect of these amendments is indicated in notes under the sections affected.

**Editor's Note.** — Where appropriate, annotations construing various sections of the Constitution of 1868 have been placed under corresponding sections of the Constitution of 1970.

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## PREAMBLE

*We, the people of the State of North Carolina, grateful to Almighty God, the Sovereign Ruler of Nations, for the preservation of the American Union and the existence of our civil, political and religious liberties, and acknowledging our dependence upon Him for the continuance of those blessings to us and our posterity, do, for the more certain security thereof and for the better government of this State, ordain and establish this Constitution.*

**History.** — The provisions of the Preamble are similar to those of the Preamble, Const. 1868.

## ARTICLE I

## DECLARATION OF RIGHTS

That the great, general, and essential principles of liberty and free government may be recognized and established, and that the relations of this State to the Union and government of the United States and those of the people of this State to the rest of the American people may be defined and affirmed, we do declare that:

### Section 1. The equality and rights of persons.

We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.

**History.** — The provisions of this section are similar to those of Art. I, § 1, Const. 1868.

**Legal Periodicals.** — For article on the continuous revision of the Constitution, see 36 N.C.L. Rev. 297 (1958).

For case law survey as to constitutional law, see 45 N.C.L. Rev. 855 (1967).

For comment on the public purpose doctrine, see 3 Wake Forest Intra. L. Rev. 37 (1967).

For note on the use of state constitutional law to void occupational licensing statutes which unreasonably restrict freedom of occupational choice, see 13 Wake Forest L. Rev. 507 (1977).

For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1116 (1981).

For essay, "'Fundamental Principles' in North Carolina Constitutional History," see 69 N.C.L. Rev. 1357 (1991).

For article, "Rediscovering State Constitutions," see 70 N.C.L. Rev. 1741 (1992).

For article, "North Carolina Constitutional History," see 70 N.C.L. Rev. 1759 (1992).

For note, "The Cause of Action for Damages Under North Carolina's Constitution: Corum v. University of North Carolina," see 70 N.C.L. Rev. 1899 (1992).

For essay, "Liberty, the 'Law of the Land,' and Abortion in North Carolina," see 71 N.C.L. Rev. 1839 (1993).

For article discussing the rise and decline of the North Carolina Abortion Fund, see 22 Campbell L. Rev. 119 (1999).

For article, "The Rising Tide of North Carolina Constitutional Protection in the New Millenium," see 27 Campbell L. Rev. 223 (2005).

## CASE NOTES

I. General Consideration.
II. Occupations and Business.
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### I. GENERAL CONSIDERATION.

*Editor's Note. — Some of the cases cited below were decided under former Art. I, § 1, Const. 1868.*

**"Person".** — A human fetus is not a "person" within the protection guaranteed by this section and N.C. Const., Art. I, § 19. Stam v. State, 302 N.C. 357, 275 S.E.2d 439 (1981).

**"Liberty".** — The term "liberty," as used in this section and N.C. Const., Art. I, § 19, does not consist simply of the right to be free from arbitrary physical restraint or servitude, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. It includes the right of the citizen to be free to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out these purposes to a successful conclusion. State v. Ballance, 229 N.C. 764, 51 S.E.2d 731 (1949).

**"Liberty" Qualified by Common-Law Doctrines.** — It is a recognized principle that a personal liberty is a constitutional right, and any act of Assembly which violates this right is not the law of the land and would be void by N.C. Const., Art. I, § 19. However, the meaning of general expressions such as "liberty" is qualified by the doctrines of the common law, which as modified to suit our institutions have been held a part of the law of this State. London v. Headen, 76 N.C. 72 (1877).

**Sovereign Immunity.** — Sovereign immunity was not available as a defense to the claims of temporary employees that were brought directly under the North Carolina Constitution against state agencies and employees. Sanders v. State Pers. Comm'n, 183 N.C. App. 15, 644 S.E.2d 10, 2007 N.C. App. LEXIS 845 (2007).

Court of appeal erred in reversing a trial court's order denying a board of education summary judgment in a mentally disabled student's action alleging that the board failed to protect him from sexual assault because the student's common law negligence claim was not an adequate remedy at state law when it was entirely precluded by the application of the doctrine of sovereign immunity since although the student had a negligence claim under the common law, that claim was automatically precluded by sovereign immunity due to the language of the board's excess liability insurance policy excluding coverage for negligent acts; constitutional rights should not be determined by the specific language of the liability insurance policies carried by the boards of education in each county. Craig v. New Hanover County Bd. of Educ., 363 N.C. 334, 678 S.E.2d 351, 2009 N.C. LEXIS 613 (June 18, 2009).

**The policy power may be exercised in the form of State legislation** where otherwise the effect may be to invade rights granted by U.S. Const., Amend. XIV only when such legislation bears a real and substantial relationship to the public health, safety, morals or some other phase of the public welfare. State v. Anderson, 275 N.C. 168, 166 S.E.2d 49 (1969).

**This section does not preclude the legislature from making classifications and distinctions** in the application of laws provided they are reasonable and just and not arbitrary. Motley v. State Bd. of Barber Exmrs., 228 N.C. 337, 45 S.E.2d 550, 175 A.L.R. 253 (1947).

**Penalty for Refusing to Accept Office.** — It is a doctrine of the common law that every citizen, in peace as well as in war, owes his services to the State when they are demanded, and a thus legislative enactment prescribing a penalty of $25.00 against any person who is duly elected or appointed town constable and who refuses to qualify is not violative of N.C. Const., Art. I, § 19 which is a protective provision of the personal liberty referred to in this section. London v. Headen, 76 N.C. 72 (1877).

**Local bond issue** of town of Lake Lure held not to violate this section. Keeter v. Town of Lake Lure, 264 N.C. 252, 141 S.E.2d 634 (1965).

**Challenge to School Financing.** — Action for declaratory and injunctive relief brought by minors who were, or would be in the future, enrolled in public schools in the county, and their parents or legal guardians, alleging that the present statutory system of financing public schools in this state resulted in inequities in educational programs and facilities between the public schools within that county, which had a relatively low tax base from which to draw funds, and those in other counties with relatively high tax bases, and that the operation of five separate school systems in that county prohibited effective use of facilities and staff and promoted inequitable use of state and local funds, thus depriving them of equal opportunity to a free public school education in violation of this section, N.C. Const., Art. I, §§ 15 and 19, and Art. IX, § 2(1), failed to allege facts entitling them to relief or conferring jurisdiction on the courts of this State. Britt v. North Carolina State Bd. of Educ., 86 N.C. App. 282, 357 S.E.2d 432 (1987).

**Provisions Held Unconstitutional.** — For case holding subdivision a2 of former G.S. 153-9(58) unconstitutional since, because of the possible retroactive application of the grandfather rights provided for, it invaded the personal and property rights guaranteed and protected by this section and N.C. Const., Art. I, §§ 19, 32 and 34, see Whaley v. Lenoir County, 5 N.C. App. 319, 168 S.E.2d 411 (1969).

For case holding amendment to G.S. 93A-2(a) enacted by Session Laws 1975, c. 108, unconstitutional as repugnant to this section and N.C. Const., Art. I, § 19, see North Carolina Real Estate Licensing Bd. v. Aikens, 31 N.C. App. 8, 228 S.E.2d 493 (1976).

A county ordinance subjecting businesses which provide male or female "companionship" to various licensing requirements was held to lack any rational, real and substantial relation to any valid objective of the county and thus to offend this section and N.C. Const., Art. I, § 19. Treants Enters., Inc. v. Onslow County, 83 N.C. App. 345, 350 S.E.2d 365 (1986).

An ordinance enacted to regulate the business of providing male and female companionship was overbroad and not rationally related to a substantial government purpose and violated the State Constitution. Treants Enters., Inc. v. Onslow County, 320 N.C. 776, 360 S.E.2d 783 (1987).

**This Section Does Not Give Individuals a Remedy Against Corporate Defendants in a Private Dispute.** — Employee's N.C. Const. art. I, § 1 claims against his former employer were dismissed because N.C. Const. art. I, § 1 did not give individuals a remedy against a corporate defendant in a private dispute. Freeman v. Duke Power Co., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 14432 (M.D.N.C. Aug. 15, 2003).

**Applied** in Heritage Village Church & Missionary Fellowship, Inc. v. State, 40 N.C. App. 429, 253 S.E.2d 473 (1979); State v. Barrett, 58 N.C. App. 515, 293 S.E.2d 896 (1982); State v. Willis, 61 N.C. App. 23, 300 S.E.2d 420 (1983); Davis v. Town of Southern Pines, 116 N.C. App. 663, 449 S.E.2d 240 (1994).

**Cited** in In re Reddy, 16 N.C. App. 520, 192 S.E.2d 621 (1972); In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973); North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976); In re Ordinance of Annexation No. 1977-4, 296 N.C. 1, 249 S.E.2d 698 (1978); In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979); Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980); DiDonato v. Wortman, 80 N.C. App. 117, 341 S.E.2d 58 (1986); Johnson v. Ruark Obstetrics & Gynecology Assocs., 89 N.C. App. 154, 365 S.E.2d 909 (1988); Woodard v. North Carolina Local Governmental Employees' Retirement Sys., 108 N.C. App. 378, 424 S.E.2d 431 (1993); Petersen v. Rowe, 337 N.C. 397, 445 S.E.2d 901 (1994); Glen ex rel. Glen v. Charlotte-Mecklenburg Sch. Bd. of Educ., 903 F. Supp. 918 (W.D.N.C. 1995); Seaton v. Owens, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 22298 (M.D.N.C. Dec. 8, 2003); State v. Sinnott, 163 N.C. App. 268, 593 S.E.2d 439, 2004 N.C. App. LEXIS 370 (2004); Sheaffer v. County of Chatham, 337 F. Supp. 2d 709, 2004 U.S. Dist. LEXIS 18982 (M.D.N.C. 2004); Copper v. Denlinger, — N.C. App. —, 667 S.E.2d 470, 2008 N.C. App. LEXIS 1817 (2008).

### II. OCCUPATIONS AND BUSINESS.

**Pursuit of Occupation — In General.** — While the legislature, in the exercise of the State police power, may protect the public against incapacity, fraud and oppression by establishing standards of personal fitness and requiring the examination and licensing of those desiring to engage in the learned professions and occupations requiring scientific or technical knowledge or skill, or which involve a trust relationship with the public, it may not impose such restrictions upon those wishing to engage in the ordinary trades or occupations which are harmless in themselves, since the right to choose and pursue a means of livelihood is a property right and a personal liberty guaranteed by the Constitution, which right may be interfered with only when necessary to the protection of the public safety or welfare. State v. Harris, 216 N.C. 746, 6 S.E.2d 854, 128 A.L.R. 658 (1940).

This section guarantees the right to pursue ordinary and simple occupations free from governmental regulation. North Carolina Real Estate Licensing Bd. v. Aikens, 31 N.C. App. 8, 228 S.E.2d 493 (1976).

**Same — Barbering.** — Statute making certain war veterans eligible for license to practice barbering without being examined does not violate this section. Motley v. State Bd. of

Barber Exmrs., 228 N.C. 337, 45 S.E.2d 550, 175 A.L.R. 253 (1947).

**Same — Optometry.** — A portion of G.S. 90-115, relating to the practice of optometry, was held violative of this section. Palmer v. Smith, 229 N.C. 612, 51 S.E.2d 8 (1948).

**Same — Photography.** — Statute providing for the licensing and supervision of photographers held violative of this section. State v. Ballance, 229 N.C. 764, 51 S.E.2d 731 (1949).

**Same — Restaurant Business.** — The constitutional right to earn a livelihood by engaging in the restaurant business is not infringed by statutes controlling alcoholic beverages. D & W, Inc. v. City of Charlotte, 268 N.C. 577, 151 S.E.2d 241 (1966).

**Same — Tile Contracting.** — Former G.S. 87-28 et seq., requiring a license for any person, firm or corporation undertaking to lay, set or install ceramic tile, marble or terrazzo floors or walls, violated this section. Roller v. Allen, 245 N.C. 516, 96 S.E.2d 851 (1957).

**Provision Not Applicable to Private Action for Termination of Employment.** — This provision did not give former employee a remedy against former employer for termination of his employment, because the provision exists chiefly to protect the individual from the State, and employee did not seek redress for any governmental action. Teleflex Info. Sys. v. Arnold, 132 N.C. App. 689, 513 S.E.2d 85 (1999).

**Dialysis Center Not Barred From Competing.** — Dialysis firm (DF) had no constitutional right to be protected from lawful competition and it was unable to overcome the N.C. Department of Health and Human Services' (DHHS) sovereign immunity on constitutional grounds since the DF was not precluded from applying for the additional certificates of needs for 10 additional dialysis centers by the DHHS's refusal to amend a Semiannual Dialysis Report; the DF was not being prevented from benefitting from the fruits and advantages of its own enterprise, industry, skill and credit, but was merely being required to compete for such benefit. Bio-Medical Applications of N.C., Inc. v. N.C. HHS, 179 N.C. App. 483, 634 S.E.2d 572, 2006 N.C. App. LEXIS 1979 (2006).

**A business involved in the buying and selling of military property has features** which distinguish it from other types of retail sales in a way which justifies its regulation. Poor Richard's, Inc. v. Stone, 322 N.C. 61, 366 S.E.2d 697 (1988).

**Article 1, Chapter 127B, regulating businesses dealing in military goods, is constitutional** under the due process and equal protection provisions of the State and federal Constitutions. Poor Richard's, Inc. v. Stone, 322 N.C. 61, 366 S.E.2d 697 (1988).

The classification created by G.S. 127B-1 is not so arbitrary or unreasonable as to be violative of the equal protection requirement. Poor Richard's, Inc. v. Stone, 322 N.C. 61, 366 S.E.2d 697 (1988).

The provisions of G.S. 127B-1 are not unreasonably burdensome within the meaning of this section and N.C. Const., Art. I, § 19. Poor Richard's, Inc. v. Stone, 322 N.C. 61, 366 S.E.2d 697 (1988).

**Terminable at Will Employee Had No Legitimate Claim of Entitlement Under Due Process Clause.** — Where there was nothing in the record which suggested that plaintiff had a contract for a definite term, her contract of employment was terminable at the will of either party, irrespective of the quality of performance, and plaintiff had no property interest in employment and no legitimate claim of entitlement under the due process clause. Peele v. Provident Mut. Life Ins. Co., 90 N.C. App. 447, 368 S.E.2d 892, appeal dismissed, 323 N.C. 366, 373 S.E.2d 547 (1988).

The classification created by G.S. 127B-1 is not so arbitrary or unreasonable as to be violative of the equal protection requirement. Poor Richard's, Inc. v. Stone, 322 N.C. 61, 366 S.E.2d 697 (1988).

The provisions of G.S. 127B-1 are not unreasonably burdensome within the meaning of this section and N.C. Const., Art. I, § 19. Poor Richard's, Inc. v. Stone, 322 N.C. 61, 366 S.E.2d 697 (1988).

**This section creates a right to conduct a lawful business or to earn a livelihood** that is "fundamental" for purposes of state constitutional analysis. Treants Enters., Inc. v. Onslow County, 83 N.C. App. 345, 350 S.E.2d 365 (1986).

**But this section and N.C. Const., Art. I, § 19 permit the State, through the exercise of its police power, to regulate economic enterprises,** provided the regulation is rationally related to a proper governmental purpose. This is the test used in determining the validity of state regulation of business under both N.C. Const., Art. I, § 1 and Art. I, § 19. Poor Richard's, Inc. v. Stone, 322 N.C. 61, 366 S.E.2d 697 (1988).

**Statute Making Insurance Carrier of Assigned Risk Policy Absolutely Liable.** — Subdivision (f)(1) of G.S. 20-279.21, when applied to an assigned risk insurance policy issued in compliance with the plan set forth in former G.S. 20-279.34 and regulations pursuant thereto, does not deprive an insurance company of its property without due process of law and otherwise than by the law of the land in contravention of U.S. Const., Amend. XIV, this section, and N.C. Const., Art. I, § 19. Jones v. State Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967).

**Contract Rights of State Employees.** — State Governor, Controller and Budget Officer violated the Contract Clause of the United

States Constitution, N.C. Const., Art. V, § 6(2) and Art. I, §§ 1 and 19 by issuing an executive order requiring state employers to forward their retirement system contributions for certain months to the state treasury to assist in balancing the budget. The actuarially unsound diversion of funds impaired the state employees' contract rights. Stone v. State, 191 N.C. App. 402, 664 S.E.2d 32, 2008 N.C. App. LEXIS 1485 (2008).

North Carolina State Personnel Commission regulated employment scheme, which was meant to delineate state employees and their appointments, was constitutional because the regulations did not exhibit a situation in which the North Carolina Legislature was interfering with an ordinary and simple occupation, nor was the employment scheme intended to be free from governmental regulation. Moreover, the regulations were rationally related to a substantial governmental interest, and nothing in the governmental action arbitrarily or irrationally limited temporary state employees' rights to earn a livelihood. Sanders v. State Personnel Comm'n, — N.C. App. —, 677 S.E.2d 182, 2009 N.C. App. LEXIS 687 (2009).

## III. HEALTH AND PUBLIC SAFETY.

**Compulsory vaccination** is a valid exercise of governmental police power for the public welfare, health and safety. But in an exceptional case, where vaccination would be dangerous, then the legislature cannot validly compel a person to submit to such protective measure, since this would be in violation of the rights recognized by this section as preexisting and inherent in the individual. State v. Hay, 126 N.C. 999, 35 S.E. 459 (1900).

**Statute Requiring Motorcycle Operator to Wear Protective Helmet.** — Statutory requirement that the operator of a motorcycle on a public highway wear a protective helmet is constitutional as a valid exercise of the police power, since the statute bears a real and substantial relationship to public safety. State v. Anderson, 275 N.C. 168, 166 S.E.2d 49 (1969).

**Restrictions on Funding Medically Necessary Abortions for Indigent Women.** — The action of the General Assembly in placing severe restrictions on the funding of medically necessary abortions for indigent women is valid and does not violate Article I, Section 1; Article 1, Section 19; or Article XI, Section 4 of the Constitution of North Carolina. Rosie J. v. North Carolina Dep't of Human Resources, 347 N.C. 247, 491 S.E.2d 535 (1997).

## IV. JUDICIAL PROCESS.

**Default Judgment Restraining Pastor from Appearing at Church.** — A judgment by default final restraining defendant, whom a majority of the members of a church had voted not to employ as its pastor after the year 1959, from appearing at the church after the year 1959 and from acting or attempting to act as its pastor at a religious service or at any other church meeting so long as he was not its pastor violated no rights guaranteed to defendant by N.C. Const., Art. I. Collins v. Simms, 254 N.C. 148, 118 S.E.2d 402 (1961); Collins v. Simms, 257 N.C. 1, 125 S.E.2d 298 (1962).

**Requiring Insurance Company to Pay Default Judgment Obtained Against Insured Under Assigned Risk Policy.** — An insurance company which has been required to issue an assigned risk policy in accordance with former G.S. 20-279.34 is not denied due process in violation of U.S. Const., Amend. XIV or in violation of this section and of N.C. Const., Art. I, § 19 by being required to pay an injured third party damages established by a default judgment obtained against its insured, even though the insurer had no notice of the accident or the action against its insured, nothing else appearing and there being no question of collusion between insured and the injured third party. Jones v. State Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967).

**Discovery Methods.** — G.S. 1A-1, Rule 26(b) is not unconstitutional on the grounds that it deprives property without due process of law, authorizes an unreasonable search and seizure, denies equal protection of the laws, or impairs the right to contract. Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

**Batson Jury Challenges.** — Because defendant failed to present a prima facie case of discrimination, a trial court's rulings denying defendant's objections to the State's use of peremptory challenges to remove African-American jurors from the jury panel solely, as defendant contended, because of their race, was upheld on appeal since the trial court had made specific findings of fact and found no proven purposeful discrimination and the State offered race-neutral explanations for each peremptory challenge. State v. Carmon, 169 N.C. App. 750, 611 S.E.2d 211, 2005 N.C. App. LEXIS 794 (2005).

**Inability to Hear Court's Colloquy with Prospective Juror.** — A capital murder defendant's right to be present was not violated by the court reporter's inability to hear a portion of the colloquy between the trial judge and a prospective juror, where both defendant and his counsel were present in the courtroom and the defendant made no showing that they were not able to hear the prospective juror. State v. White, 349 N.C. 535, 508 S.E.2d 253 (1998), cert. denied, 527 U.S. 1026, 119 S. Ct. 2376, 144 L. Ed. 2d 779 (1999).

**Punitive Damages Cap.** — The statutory limit on punitive damages in G.S. 1D-25 does not constitute an unconstitutional taking of property by denying plaintiffs of the "enjoyment of the fruits of their own labor" under N.C. Const. art. I, § 1 because (1) a jury's verdict is not "property" in which a plaintiff enjoys a vested right where the limitation on punitive damages applies prior to the entry of judgment; and (2) a litigant's participation in a trial is not a "labor" nor is a jury's verdict the "fruits" of that labor. Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004).

### OPINIONS OF ATTORNEY GENERAL

**Moratorium on Granting of Permits for Hazardous Waste Facilities.** — The Governor does not have the authority to issue a moratorium on the granting of permits for hazardous waste facilities in this State. See opinion of Attorney General to Mr. Tom Karnoski, Hazardous Waste Treatment Commission (now the Hazardous Waste Management Commission), 55 N.C.A.G. 73 (1986).

## Sec. 2. Sovereignty of the people.

All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

**History.** — The provisions of this section are similar to those of Art. I, § 2, Const. 1868.

**Legal Periodicals.** — For article, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

For survey of 1982 law on Criminal Procedure, see 61 N.C.L. Rev. 1090 (1983).

### CASE NOTES

***Editor's Note.*** *— Some of the cases cited below were decided under former Art. I, § 2, Const. 1868.*

**All power which is not limited by the Constitution inheres in the people.** Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

**Elections.** — In construing the provisions of the North Carolina Constitution in regard to elections, it should be kept in mind that this is a government of the people in which the will of the people — the majority — legally expressed, must govern, and that these provisions should be liberally construed, that tend to promote a fair election, or expression of this popular will. State ex rel. Quinn v. Lattimore, 120 N.C. 426, 26 S.E. 638 (1897).

**Acts Enacted by General Assembly.** — It is axiomatic that since all political power is derived from the people and all government originates from them, the sovereign power of the people, expressed through their chosen representatives in the General Assembly, is supreme, and a law enacted by them may not be set aside by the courts unless it contravenes some prohibition or mandate of the Constitution by which the people of the State have elected to be limited and restrained, or unless it violates some provision of the granted powers of federal government contained in the Constitution of the United States. State v. Warren, 211 N.C. 75, 189 S.E. 108 (1937).

An act of the General Assembly is legal when the Constitution contains no prohibition against it. Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

**Exchange of Land by Board of Education.** — There is nothing in the Constitution which prohibits the board of education from exchanging land which it owns for other land for school purposes. Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

**Constitutionality of 1970 Ballot.** — Defendant's defense to real estate tax liability (based on alleged defects in 1970 ballot which, defendant asserted, rendered the 1970 amendments violative of due process) was barred by laches where defendant waited 18 years before inquiring into the effect of the 1970 ballot and where he participated in the ballot. Franklin County v. Burdick, 103 N.C. App. 496, 405 S.E.2d 783 (1991).

**Cited** in Royal v. State, 153 N.C. App. 495, 570 S.E.2d 738, 2002 N.C. App. LEXIS 1167 (2002).

### OPINIONS OF ATTORNEY GENERAL

**Moratorium on Granting of Permits for Hazardous Waste Facilities.** — The Governor does not have the authority to issue a moratorium on the granting of permits for hazardous waste facilities in this State. See opinion of Attorney General to Mr. Tom Karnoski, Hazardous Waste Treatment Commission (now the Hazardous Waste Management Commission), 55 N.C.A.G. 73 (1986).

## Sec. 3. Internal government of the State.

The people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness; but every such right shall be exercised in pursuance of law and consistently with the Constitution of the United States.

**History.** — The provisions of this section are similar to those of Art. I, § 3, Const. 1868.

**Legal Periodicals.** — For survey of 1982 law on criminal procedure, see 61 N.C.L. Rev. 1090 (1983).

### CASE NOTES

***Editor's Note.*** — *Some of the cases cited below were decided under former Art. I, § 3, Const. 1868.*

**The Constitution of the United States** takes precedence over the Constitution of North Carolina. Constantian v. Anson County, 244 N.C. 221, 93 S.E.2d 163 (1956).

**Choice of Law.** — It is the duty of the Supreme Court of this State to follow the decisions of the Supreme Court of the United States upon questions involved in interstate commerce where Congress has assumed control of the matter relating thereto. But in intrastate cases, the decisions of the Supreme Court of this State are binding and will be followed in the United States Supreme Court, even though they appear "absurd and illogical." Norris v. Western Union Tel. Co., 174 N.C. 92, 93 S.E. 465 (1917).

**Regulation of Criminal Practice.** — The legislature has the power to shape the criminal procedure of this State to provide remedies required by the exigencies of the present time. State v. Lewis, 142 N.C. 626, 55 S.E. 600 (1906).

**Cited** in Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377, 2002 N.C. LEXIS 420 (2002).

## Sec. 4. Secession prohibited.

This State shall ever remain a member of the American Union; the people thereof are part of the American Nation; there is no right on the part of this State to secede; and all attempts, from whatever source or upon whatever pretext, to dissolve this Union or to sever this Nation, shall be resisted with the whole power of the State.

**History.** — The provisions of this section are similar to those of Art. I, § 4, Const. 1868.

### CASE NOTES

**Cited** in Employment Sec. Comm'n v. Peace, 128 N.C. App. 1, 493 S.E.2d 466 (1997).

## Sec. 5. Allegiance to the United States.

Every citizen of this State owes paramount allegiance to the Constitution and government of the United States, and no law or ordinance of the State in contravention or subversion thereof can have any binding force.

**History.** — The provisions of this section are similar to those of Art. I, § 5, Const. 1868.

CASE NOTES

*Editor's Note. — Some of the cases cited below were decided under former Art. I, § 5, Const. 1868.*

**The Constitution of the United States** takes precedence over the Constitution of North Carolina. Constantian v. Anson County, 244 N.C. 221, 93 S.E.2d 163 (1956).

**Delegation of authority to counties to construct water and sewer systems** does not violate this section. Ramsey v. Rollins, 246 N.C. 647, 100 S.E.2d 55 (1957).

**Cited** in Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377, 2002 N.C. LEXIS 420 (2002).

## Sec. 6. Separation of powers.

The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.

**History.** — The provisions of this section are similar to those of Art. I, § 8, Const. 1868.

**Legal Periodicals.** — For note on judicial review and separation of powers, see 45 N.C.L. Rev. 467 (1967).

For case law survey as to separation of powers, see 45 N.C.L. Rev. 891 (1967).

For note analyzing possible constitutional barriers to judicial abrogation of contractual governmental immunity, see 12 Wake Forest L. Rev. 1082 (1976).

For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

For comment on sectarian education and the state, see 1980 Duke L.J. 801.

For article, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

For survey of 1981 constitutional law, see 60 N.C.L. Rev. 1272 (1982).

For article discussing limitations on ad hoc adjudicatory rulemaking by an administrative agency, see 61 N.C.L. Rev. 67 (1982).

For survey of 1982 law relating to constitutional law, see 61 N.C.L. Rev. 1052 (1983).

For discussion of separation of powers in North Carolina, see 62 N.C.L. Rev. 1 (1983).

For article on the "Battle Among the Branches: The Two Hundred Year War," see 65 N.C.L. Rev. 901 (1987).

For note on the separation of powers and the power to appoint, see 66 N.C.L. Rev. 1109 (1988).

For note, "The Forty-Two Hundred Dollar Question: 'May State Agencies Have Discretion in Setting Civil Penalties Under the North Carolina Constitution?'," see 68 N.C.L. Rev. 1035 (1990).

For comment, "Legal Analysis of the Constitutionality of the Water Supply Watershed Protection Act of 1989 and the Hyde Bill," see 29 Wake Forest L. Rev. 1279 (1994).

For article, "A Study in Separation of Powers: Executive Power in North Carolina," see 77 N.C.L. Rev. 2049 (1999).

CASE NOTES

I. In General.
II. Delegation of Legislative Power.

### I. IN GENERAL.

*Editor's Note. — Some of the cases cited below were decided under former Art. I, § 8, Const. 1868.*

**Principle Stated.** — This section embodies succinctly the judgment of the people of North Carolina in regard to the principle of the separation of powers. Long v. Watts, 183 N.C. 99, 110 S.E. 765, 22 A.L.R. 277 (1922).

The principle of separation of powers was clearly in the minds of the framers of the Constitution; and the people of North Carolina, by specifically including a separation of powers provision in the original Constitution adopted in 1776, and readopting the provision in 1868 and 1970, are firmly and explicitly committed to the principle. In re Powers, 295 S.E.2d 589 (N.C. 1982).

**Functions Separate.** — Each of the coordinate departments has its appropriate functions, and one cannot control the action of the other in the sphere of its constitutional power and duty. State v. Holden, 64 N.C. 829 (1870); Person v. Board of State Tax Comm'rs, 184 N.C. 499, 115 S.E. 336 (1922).

**Classification of Departments Is Not Exact.** — Although the State is firmly committed to the doctrine of separation of powers, the classification cannot be very exact, and there are many officers whose duties cannot be exclusively arranged under the duties of either of the judicial, legislative or executive heads.

Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

**The independence of the Supreme Court** only, and not of the entire judicial department, is provided for by this section. But there is nothing which gives the Supreme Court supervisory control over the legislature. Walser ex rel. Wilson v. Jordan, 124 N.C. 683, 33 S.E. 139 (1899).

**Constitution Shields Judicial Branch from Legislative Interference So Far as Its Inherent Rights and Powers.** — Pursuant to N.C. Const., Art. I, § 6 and N.C. Const., Art. IV, § 1, the North Carolina Constitution shields the judicial branch from legislative interference, so far at least as its inherent rights and powers are concerned. Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004).

**Court Practice Regulated by Judiciary.** — Under the Constitution, as the supreme judicial power is independent of the other departments, the legislature cannot prescribe rules of practice for the Supreme Court; nevertheless, the courts have copied, almost verbatim, the provisions of the Code. Herndon v. Imperial Fire Ins. Co., 111 N.C. 384, 16 S.E. 465 (1892); Bird v. Gilliam, 125 N.C. 76, 34 S.E. 196 (1899).

Where there is conflict between the rules of practice prescribed by the legislature and the rules made by the Supreme Court, the rules made by the court will be observed. Cooper v. Board of Comm'rs, 184 N.C. 615, 113 S.E. 569 (1922).

The Supreme Court has the sole right to prescribe rules of practice and procedure therein. Lee v. Baird, 146 N.C. 361, 59 S.E. 876 (1907); State v. Furmage, 250 N.C. 616, 109 S.E.2d 563 (1959).

The rules prescribed by the Supreme Court to regulate its own procedure, including the rule as to dismissing an appeal thereto if not docketed, or a recordari prayed for in apt time, will be strictly enforced. Being under the exclusive authority therein given to the Supreme Court by this section, a statute in conflict therewith will not be observed. State v. Ward, 184 N.C. 618, 113 S.E. 775 (1922).

**Legislative Change of Court Jurisdiction.** — The principle that when the jurisdiction of a particular court is constitutionally defined the legislature cannot by statute restrict or enlarge that jurisdiction unless it is authorized to do so by the Constitution is grounded on the separation of powers provisions found in many American Constitutions, including the Constitution of this State. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

When the jurisdiction of a particular court is constitutionally defined, the legislature cannot by statute restrict or enlarge that jurisdiction unless it is authorized to do so by the Constitution. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The General Assembly is without authority to expand the appellate jurisdiction of the Supreme Court beyond the limits set in the Constitution. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The General Assembly has no authority to provide for appeal from decisions of administrative agencies to the Supreme Court without prior appeal to and review by a lower court. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The Supreme Court has no original jurisdiction over claims against the State, and the General Assembly has no authority to confer such jurisdiction upon it. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

**The legislature may constitutionally provide for a "de novo" review of the quasi-judicial decision of an agency;** therefore, review of a civil service board's decision by the superior court under the "de novo" standard did not violate this section nor impermissibly allow the judicial branch to substitute its judgment for that of the city manager on a personnel matter where the question before the superior court was not whether the employee should have been terminated rather than demoted, suspended, or transferred, but whether the action of the employee's supervisor was "justified." Jacobs v. City of Asheville, 137 N.C. App. 441, 528 S.E.2d 905, 2000 N.C. App. LEXIS 430 (2000).

**Judicial power cannot be exercised in aid of an unfinished and inoperative act,** so left upon the final adjournment, any more than in obstructing legislative action. State ex rel. Scarborough v. Robinson, 81 N.C. 409 (1879).

Under the separation of powers doctrine, the legislative, executive, and supreme judicial powers of the state government were separate and distinct from each other; where hog farming companies' lagoon waste management systems existed pursuant to express legislative authority, the trial court properly declined to enjoin the operation as a nuisance. Neuse River Found. v. Smithfield Foods, Inc., 155 N.C. App. 110, 574 S.E.2d 48, 2002 N.C. App. LEXIS 1637 (2002), cert. denied, 356 N.C. 675, 577 S.E.2d 628 (2003).

**Court's Proper Exercise of Jurisdiction.** — There is no violation of the Separation of Powers Clause when a court issues an order within its inherent power to do what is reasonably necessary within the scope of its constitutional and statutory jurisdiction. In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

There was no violation of the Separation of Powers Clause when the district court, exercising its exclusive, original jurisdiction, issued the order for a juvenile sex offender's commitment and the order denying the juvenile's conditional release as requested by Division of Youth Services, both of which included dispositional directives regarding the juvenile's needs for specialized sexual offender treatment. In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

Subject matter jurisdiction existed over the question of whether the Governor was required to release certain records relating to applications for clemency pursuant to the North Carolina Public Records Law because resolving the relevant issues required the court to exercise its fundamental responsibility to determine the proper meaning of N.C. Const., Art. III, § 5(6); the case did not raise a political question by requiring the court to intrude upon the Governor's clemency powers, but only required the court to identify where to draw the line between the Executive Branch and the Legislature with respect to clemency, given the separation of powers doctrine. News & Observer Publ'g Co. v. Easley, 182 N.C. App. 14, 641 S.E.2d 698, 2007 N.C. App. LEXIS 490 (2007).

**Redistricting.** — G.S. 120-2.3 and G.S. 120-2.4 are not unconstitutional limitations on the judicial branch, as they allow the General Assembly to exercise its proper responsibilities and they decrease the risk that the courts will encroach upon the responsibilities of the legislative branch, pursuant to N.C. Const., Art. I, § 6. Stephenson v. Bartlett, 358 N.C. 219, 595 S.E.2d 112 (2004).

**Punitive Damages Cap.** — G.S. 1D-25, which places a cap on punitive damages, did not unconstitutionally violate the principle of separation of powers by exercising the power of remittitur, because the cap on punitive damages is different from remittitur, in that it requires an award to be limited after a proper jury trial, while remittitur, under G.S. 1A-1, Rule 59, allows a new trial for excessive damages awarded under the influence of passion or prejudice. Rhyne v. K-Mart Corp., 149 N.C. App. 672, 562 S.E.2d 82, 2002 N.C. App. LEXIS 316 (2002), aff'd, 358 N.C. 160, 594 S.E.2d 1 (2004).

G.S. 1D-25 does not operate as a "legislative remittitur" because, unlike remittitur, G.S. 1D-25 does not grant the General Assembly the authority to remit excessive awards on a case-by-case basis, but rather, by enacting G.S. 1D-25, the General Assembly has imposed a limit on the recovery of punitive damages in all cases; this function is wholly distinct from that within the trial court's authority to apply fixed laws to individual controversies, and thus, G.S. 1D-25 did not violate separation of powers principles under N.C. Const., Art. I, § 6. Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004).

G.S. 1D-25 does not represent an impermissible interference with the judiciary's constitutionally defined authority because the Constitution neither expressly nor implicitly empowers North Carolina courts to award punitive damages or to remit excessive awards thereof; rather, because punitive damages are awarded on grounds of public policy, G.S. 1D-25 is a modification of the common law within the General Assembly's policy-making authority to define legally cognizable remedies. Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004).

**The propriety of ordering sales of lands** upon petition of the owner is purely a judicial duty, and any private act of the General Assembly attempting to regulate the same is void under this section. Miller v. Alexander, 122 N.C. 718, 30 S.E. 125 (1898).

**Judicial Function in Criminal Cases.** — The function of the court in regard to the punishment of crimes is to determine the guilt or innocence of the accused, and if that determination is one of guilt, then to pronounce the punishment or penalty prescribed by law. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

**Authority of District Attorney to Enhance Legislatively Prescribed Punishment Upheld.** — The habitual felon provisions of G.S. 14-7.1 et seq., the Habitual Felon Act, do not violate this section. State v. Wilson, 139 N.C. App. 544, 533 S.E.2d 865, 2000 N.C. App. LEXIS 988 (2000), cert. denied, 353 N.C. 279, 546 S.E.2d 395 (2000).

**Amendment of Judicially Imposed Criminal Sentences by Corrections Department.** — The legislative, executive, and supreme judicial powers of the State government are separate and distinct from each other; therefore, by independently amending sentences imposed by trial courts to reflect compliance with its interpretation of statutory authority, the Corrections Department usurped the power of the judiciary and violated the separation of powers doctrine. Hamilton v. Freeman, 147 N.C. App. 195, 554 S.E.2d 856, 2001 N.C. App. LEXIS 1147 (2001), cert. denied, 355 N.C. 285, 560 S.E.2d 802 (2002).

Even though superior court's order of consecutive sentencing was contrary to law, the Department of Corrections could not alter that order by refusing to change defendant's records to reflect concurrent sentencing without violating the separation of powers doctrine under N.C. Const., Art. I, § 6; the order was entered under the superior court's exclusive, original jurisdiction over all criminal actions under G.S. 7A-271(a), and was therefore a voidable, not a void, judgment, and the Department, as a part of the executive branch, was bound to honor the judgment until it was corrected or vacated. State v. Ellis, 167 N.C. App. 276, 605 S.E.2d 168, 2004 N.C. App. LEXIS 2161 (2004), rev'd 361 N.C. 200, 639 S.E.2d 425 (2007) (remanded to allow defendant to withdraw his guilty plea).

**Manner and Mitigation of Punishment Are Legislative Functions.** — The manner of executing a sentence and the mitigation of punishment are determined by the legislative department, and what the legislature has determined in that regard must be put in force and effect by administrative officers. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

**Habitual Offender Act Not Violative of Separation of Powers Clause.** — Defendant's constitutional challenges to his sentence as an habitual felon failed because (1) the North Carolina Habitual Felon Act was not violative of the Separation of Powers Clause; (2) there was no double jeopardy infirmity inherent in the Habitual Felon Act as applied in conjunction with the North Carolina Structured Sentencing Act; and (3) the state appellate court and the state supreme court have rejected constitutional challenges to the Habitual Felon Act based on allegations of cruel and unusual punishment. State v. McIlwaine, 169 N.C. App. 397, 610 S.E.2d 399, 2005 N.C. App. LEXIS 607 (2005).

**Legislature May Establish Parole System.** — In the division of governmental authority, the legislature has exclusive power to determine the penological system of the State. It alone can prescribe the punishment for crime. It may therefore establish a parole system. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

The granting, withholding or frustration of the parole power is not and has never been a responsibility of the judicial branch of government. State v. Snowden, 26 N.C. App. 45, 215 S.E.2d 157, cert. denied, 288 N.C. 251, 217 S.E.2d 675 (1975).

**And Administration of Parole System May Be Delegated.** — The granting of parole and the supervision of parolees are purely administrative functions, and accordingly may be entrusted by the legislature to nonjudicial agencies. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

**The sentencing process may not be expressly employed to thwart the parole process,** the responsibility for which is vested in another branch of government. State v. Snowden, 26 N.C. App. 45, 215 S.E.2d 157, cert. denied, 288 N.C. 251, 217 S.E.2d 675 (1975).

**Removal of Officeholder.** — It is competent for the legislature in creating an office, other than purely judicial, to reserve to itself the right to remove, or to the Governor to suspend, the incumbent of the office. State ex rel. Caldwell v. Wilson, 121 N.C. 425, 121 N.C. 480, 28 S.E. 554, 28 S.E. 554 (1897).

**Issuance of a warrant,** whether considered a judicial act, a quasi-judicial act, a judicial function, or a ministerial act, does not require or involve the exercise of supreme judicial power within the meaning of this section. State v. Furmage, 250 N.C. 616, 109 S.E.2d 563 (1959).

A solicitor has no authority to administer an oath or to issue a warrant, absent authorization by the General Assembly. State v. Furmage, 250 N.C. 616, 109 S.E.2d 563 (1959).

Public-local law authorizing solicitor of recorder's court to issue warrants is not violative of this section. State v. Furmage, 250 N.C. 616, 109 S.E.2d 563 (1959).

**Creation of Board with Quasi-Judicial and Administrative Functions.** — The creation by the legislature of a board or municipal corporation and the conferring upon such board or municipal corporation of quasi-judicial and administrative functions does not violate this provision. Cox v. City of Kinston, 217 N.C. 391, 8 S.E.2d 252 (1940).

**This section requires the North Carolina Department of Human Resources (NCDHR) to acquiesce in statutory interpretations** made by North Carolina's appellate courts to the extent that they conflict with the NCDHR's interpretations. Thomas v. North Carolina Dep't of Human Resources, 124 N.C. App. 698, 478 S.E.2d 816 (1996), aff'd, 346 N.C. 268, 485 S.E.2d 295 (1997).

The North Carolina Department of Human Resources and other administrative agencies of the State must give full effect to the statutory constructions of the Court of Appeals both as to the named litigants and as to all persons similarly situated. Thomas v. North Carolina Dep't of Human Resources, 124 N.C. App. 698, 478 S.E.2d 816 (1996), aff'd, 346 N.C. 268, 485 S.E.2d 295 (1997).

**Appointment of Director of Office of Administrative Hearings.** — It is not a violation of the separation of powers provision of the Constitution for the General Assembly to provide that the Chief Justice of the Supreme Court shall appoint the Director of the Office of Administrative Hearings. State ex rel. Martin v. Melott, 320 N.C. 518, 359 S.E.2d 783 (1987).

**Indigent Defense Services Act and the Office of Indigent Defense Services did not violate the state constitution's separation of powers principles;** appointing and compensating attorneys for indigent criminals was not committed to any one state government branch. Ivarsson v. Office of Indigent Def. Servs., 156 N.C. App. 628, 577 S.E.2d 650, 2003 N.C. App. LEXIS 208 (2003), cert. denied, 357 N.C. 250, 582 S.E.2d 269 (2003).

**The order of the Supreme Court establishing the Client Security Fund and requiring annual payments by attorneys to the Fund** was an essential corollary to the court's function, was required for the proper administration of justice, and did not violate the Constitution. Beard v. North Carolina State Bar, 320 N.C. 126, 357 S.E.2d 694 (1987).

**Power of County to Apply Formula for**

**Ascertaining Taxable Property.** — Where county ascertained the amount of personal property of defendant nonresident corporation having a "business situs" in this State and liable for taxation as solvent credits by the county by ascertaining the total assets of the defendant and the percentage of such assets found in the county, and allowing the same percent of its total liabilities to be deducted therefrom, defendant, who complained that county had made its own rule in ascertaining the solvent credits in the county subject to taxation in violation of this section, but failed to list its solvent credits for taxation as required by law, was not prejudiced by the assessment of its personal property for taxation as determined by the county. County of Mecklenburg v. Sterchi Bros. Stores, 210 N.C. 79, 185 S.E. 454 (1936).

**Division of Motor Vehicle's Action Violated Separation of Powers Doctrine.** — North Carolina Division of Motor Vehicles violated the separation of powers clause in the North Carolina Constitution and violated a driver's right to due process when it unilaterally voided a district court ordered limited driving privilege to a driver; furthermore, by allowing the North Carolina Division of Motor Vehicles to, in essence, invalidate a properly entered court order, G.S. 20-179.3(k) violates the provisions requiring separation of powers contained in N.C. Const., Art. I, § 6; N.C. Const., Art. IV, § 1; and N.C. Const., Art. IV, § 3. State v. Bowes, 159 N.C. App. 18, 583 S.E.2d 294, 2003 N.C. App. LEXIS 1439 (2003), cert. denied, 358 N.C. 156, 592 S.E.2d 698 (2004).

**Road Closure Appeal Procedure not Unconstitutional.** — G.S. 160A-299(b) did not deprive a home owner of his right to a fair hearing or violate the Separation of Powers Clause of the North Carolina Constitution in his appeal from a town council order closing a road because he had the opportunity to test, rebut, and explain evidence presented to the council at three public hearings held on the road closure over a two-month period; these hearings were the proper place for him to present evidence and to rebut any evidence contrary to his position. Houston v. Town of Chapel Hill, 177 N.C. App. 739, 630 S.E.2d 249, 2006 N.C. App. LEXIS 1199 (2006).

**Because the General Assembly did not intend, in passing G.S. 105-113.4C, to retroactively limit the procedures and standard for review governing the question of diligent enforcement of an escrow statute,** a business court's order compelling arbitration does not violate the separation of powers doctrine in N.C. Const,, Art. I, § 6; Art. II, §§ 1 and 20; and Art. IV, § 1. State v. Philip Morris USA, Inc., — N.C. App. —, 666 S.E.2d 783, 2008 N.C. App. LEXIS 1757 (2008).

**Applied** in State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 65 N.C. App. 198, 309 S.E.2d 473 (1983); State ex rel. Martin v. Preston, 325 N.C. 438, 385 S.E.2d 473 (1989); News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992); State ex rel. Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79 (1982); Shavitz v. City of High Point, 270 F. Supp. 2d 702, 2003 U.S. Dist. LEXIS 11839 (M.D.N.C. 2003).

**Cited** in Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971); Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973); State v. Camp, 286 N.C. 148, 209 S.E.2d 754 (1974); State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Admin. Office, 30 N.C. App. 427, 227 S.E.2d 603 (1976); State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Admin. Office, 292 N.C. 1, 231 S.E.2d 867 (1977); In re Ordinance of Annexation No. 1977-4, 296 N.C. 1, 249 S.E.2d 698 (1978); In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979); Reed v. Byrd, 41 N.C. App. 625, 255 S.E.2d 606 (1979); State v. Small, 301 N.C. 407, 272 S.E.2d 128 (1980); State v. Rogers, 52 N.C. App. 676, 279 S.E.2d 881 (1981); Granville County Bd. of Comm'rs v. North Carolina Hazardous Waste Mgt. Comm'n, 329 N.C. 615, 407 S.E.2d 785 (1991); State v. Allen, 346 N.C. 731, 488 S.E.2d 188 (1997); State v. Gilmore, 142 N.C. App. 465, 542 S.E.2d 694, 2001 N.C. App. LEXIS 136 (2001); State v. Brown, 146 N.C. App. 299, 552 S.E.2d 234, 2001 N.C. App. LEXIS 864 (2001); Stone v. State, 191 N.C. App. 402, 664 S.E.2d 32, 2008 N.C. App. LEXIS 1485 (2008).

## II. DELEGATION OF LEGISLATIVE POWER.

**In General.** — The legislature may not abdicate its power to make laws nor delegate its supreme legislative power to any other coordinate branch or to any agency which it may create. State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970); Martin v. North Carolina Hous. Corp., 277 N.C. 29, 175 S.E.2d 665 (1970); Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The effect of this section and N.C. Const., Art. II, § 1 is to elucidate the circumstances in which delegation of legislative powers is permissible. Heritage Village Church & Missionary Fellowship, Inc. v. State, 40 N.C. App. 429, 253 S.E.2d 473 (1979), aff'd, 299 N.C. 399, 263 S.E.2d 726 (1980).

**Delegation to Municipalities.** — Ordinary restrictions with respect to the delegation of power to an agency of the State, which exercises no function of government, do not apply to cities, towns or counties. Plemmer v. Matthewson, 281 N.C. 722, 190 S.E.2d 204 (1972).

**Delegation to Administrative Bodies.** — As to some specific subject matter, the legislature may delegate a limited portion of its legislative power to an administrative agency if it prescribes the standards under which the agency is to exercise the delegated powers. State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970).

A modern legislature must be able to delegate, in proper instances, a limited portion of its legislative powers to administrative bodies which are equipped to adapt legislation to complex conditions involving numerous details with which the legislature cannot deal directly. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The principle that the General Assembly may not delegate its power to any other department or body, is not absolute. Since legislation must often be adapted to complex conditions involving numerous details with which the legislature cannot deal directly, the constitutional prohibition against delegating legislative authority does not deny to the legislature the necessary flexibility of enabling it to lay down policies and establish standards, while leaving to designated governmental agencies and administrative boards the determination of facts to which the policy as declared by the legislature shall apply. A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

**Necessity for Adequate Standards When Delegating Power.** — As to some specific subject matter, the legislature may delegate a limited portion of its legislative power to an administrative agency if it prescribes the standards under which the agency is to exercise the delegated powers. Martin v. North Carolina Hous. Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

The constitutional inhibition against delegating legislative authority does not preclude the legislature from transferring adjudicative and rule-making powers to administrative bodies, provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

When there is an obvious need for expertise in the achievement of legislative goals, the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation. It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The test of constitutional delegation of legislative power is whether the delegation is accompanied by adequate guiding standards; if so, the delegation will be upheld. In re Broad & Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980).

The General Assembly must prescribe the standard for an administrative board with sufficient definiteness so that the board is bound by legislative policy and cannot, under the name of finding facts, actually set policy. Farlow v. North Carolina State Bd. of Chiropractic Exmrs., 76 N.C. App. 202, 332 S.E.2d 696, cert. denied and appeal dismissed, 314 N.C. 664, 336 S.E.2d 621 (1985).

**Purpose of Adequate Guiding Standards Test.** — The purpose of the adequate guiding standards test is to reconcile the legislative need to delegate authority with the constitutional mandate that the legislature retain in its own hands the supreme legislative power. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978). See also, In re Broad & Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980).

**Application of Test.** — The key to an intelligent application of the adequate guiding standards test is an understanding that, while delegations of power to administrative agencies are necessary, such transfers of power should be closely monitored to insure that the decision making by the agency is not arbitrary and unreasoned and that the agency is not asked to make important policy choices which might just as easily be made by the elected representatives in the legislature. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

**Specificity of Legislative Goals.** — Goals and policies set forth by legislature for an agency to apply in exercising its powers need be only as specific as the circumstances permit. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978); In re Broad & Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980).

**Procedural Safeguards.** — In determining whether a particular delegation of authority is supported by adequate guiding standards, it is permissible to consider whether the authority vested in the agency is subject to procedural safeguards. A key purpose of the adequate guiding standards test is to insure that the decision making by the agency is not arbitrary and unreasoned. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978). See also, In re Broad & Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980).

Procedural safeguards tend to encourage adherence to legislative standards by the agency to which power has been delegated. The presence or absence of procedural safeguards is relevant to the broader question of whether a delegation of authority is accompanied by adequate guiding standards. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

**Delegation of Power Upheld.** — Creation of the Mattamuskeet Drainage District by the legislature is not violative of the Constitution. O'Neal v. Mann, 193 N.C. 153, 136 S.E. 379 (1927).

Statute authorizing the Industrial Commission to award compensation for bodily disfigurement is not unconstitutional as a void delegation of legislative power in contravention of this section. Baxter v. W.H. Arthur Co., 216 N.C. 276, 4 S.E.2d 621 (1939).

The North Carolina Turnpike Authority Act, former G.S. 136-89.59 to 136-89.77, did not violate this section. North Carolina Tpk. Auth. v. Pine Island, Inc., 265 N.C. 109, 143 S.E.2d 319 (1965).

Chapter 1177 of Session Laws 1967 (G.S. 116-209.1 et seq.), which authorizes the State Education Assistance Authority to issue revenue bonds and to use the proceeds therefrom for the making of loans to "residents of this State to enable them to obtain an education in an eligible institution" as set forth in G.S. 116-209.2, when supplemented by federal legislation, provides sufficient legislative standards whereby the Authority can determine to which students the loans should be made, since it is implicit in c. 1177 that all loans made from the bond proceeds shall be made in compliance with the standards of federal legislation which supplement the loan program of the Authority. State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970).

Former G.S. 148-62, insofar as it granted discretionary power to the Board of Paroles (now the Parole Commission), did not constitute an assignment of judicial power in contravention of N.C. Const., Art. IV, § 1 and this section. Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788, aff'd, 279 N.C. 556, 184 S.E.2d 259 (1971).

Petitioner's contention that the legislature had provided no standards to guide the Board of Paroles (now the Parole Commission) in determining whether a parole violator should serve his original sentence concurrently with his new sentence or at the completion of it and that this failure nullified the purported grant of authority under former G.S. 148-62 could not be sustained. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

In delegating to the town commissioners the discretionary right to decide whether to enlarge the corporate limits as specified in a special act, Session Laws 1971, c. 801, the General Assembly did not delegate legislative authority in violation of N.C. Const., Art. II, § 1, or this section. In authorizing the annexation, the General Assembly determined that the annexation was suitable and proper. Except for approval by the town's board of commissioners, the act was complete in every respect at the time of its ratification. The only discretion given the commissioners was to decide whether or not to annex the territory specified in the act. Plemmer v. Matthewson, 281 N.C. 722, 190 S.E.2d 204 (1972).

The Coastal Area Management Act of 1974 (G.S. 113A-100 et seq.) properly delegates authority to the Coastal Resources Commission to develop, adopt and amend State guidelines for the coastal area. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The delegation of authority to the North Carolina Department of Transportation and the Board of Transportation to plan and construct an interstate highway did not constitute an unlawful delegation of legislative authority to an administrative body which was unrestrained by legislative standards or sufficient procedural safeguards or political accountability in violation of this section and N.C. Const., Art. II, § 1. Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina Dep't of Transp., 46 N.C. App. 350, 265 S.E.2d 890 (1980).

G.S. 113-229(e)(2), which permits the review commission to deny an application for a permit to dredge or fill in estuarine waters upon finding "that there will be significant adverse effect on the value and enjoyment of the property of riparian owners," does not constitute an unlawful delegation of legislative power in violation of this section, as adequate statutory guidelines and procedural safeguards have been provided. In re Broad & Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980).

The proscription of "unethical conduct" in G.S. 90-154 is a sufficiently definite standard so that the Board of Chiropractic Examiners may set policies within it without exercising a legislative function. Farlow v. North Carolina State Bd. of Chiropractic Exmrs., 76 N.C. App. 202, 332 S.E.2d 696, cert. denied and appeal dismissed, 314 N.C. 664, 336 S.E.2d 621 (1985).

This section does not unconstitutionally delegate legislative power, where the statute authorizes the Board of Law Examiners to make rules governing admission to the bar to "promote the welfare of the State and the profession," and a person who was not allowed to take the bar exam because her law school was not ABA accredited contended that the Board was not given adequate standards to guide its actions. Bring v. North Carolina State Bar, 348 N.C. 655, 501 S.E.2d 907 (1998).

Commissioner's promulgation of 11 N.C.A.C. 12.0319, prohibiting subrogation provisions in life or accident and health insurance contracts,

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supported by G.S. 58-2-40 (right to limit practices injurious to the public) and G.S. 58-50-15(a) (prohibiting provisions less favorable to the insured), did not exceed his statutory authority, even though it may change state substantive law, and did not amount to an unconstitutional delegation of legislative powers, because statutory provisions (G.S. 58-2-40, 58-51-15, and 58-50-15) and judicial review (available under G.S. 150B, et seq.) offer adequate procedural safeguards and support the delegation of power to the Commissioner. In re Ruling by N. C. Comm'r of Ins., 134 N.C. App. 22, 517 S.E.2d 134, 1999 N.C. App. LEXIS 665 (1999), cert. denied, appeal dismissed, 351 N.C. 105, 540 S.E.2d 356 (1999).

G.S. 20-38.6(a), (f) and G.S. 20-38.7(a) do not violate the separation of powers doctrine of the North Carolina Constitution because there is no usurpation of the judicial power of the State by the Legislature in the enactment of these statutory provisions. State v. Fowler, —N.C. App. —, 676 S.E.2d 523, 2009 N.C. App. LEXIS 832 (May 19, 2009).

### OPINIONS OF ATTORNEY GENERAL

**Delay of Rules by Review Commission.** — An act vesting in the Administrative Rules Review Commission (ARRC), a commission appointed by the General Assembly, the power to delay indefinitely the effective date of duly adopted agency rules which it deems in excess of statutory authority would likely be held to violate this section by vesting the ARRC with judicial powers reserved to the court and with supreme legislative powers reserved to the General Assembly. See opinion of Attorney General to Henson P. Barnes, President Pro Tempore, Senate, 60 N.C.A.G. 70 (1991).

**Independent actions of individual members of the General Assembly,** regardless of the member's position of leadership, do not constitute the exercise of official legislative power triggering constitutional safeguards. See opinion of Attorney General to The Hon. Leslie Merritt, Auditor, State of North Carolina, 2005 N.C. AG LEXIS 3 (9/12/05).

**Legislators Precluded from Serving on the Board of North Carolina Partnership for Children, Inc.** — This section precludes legislators from serving as members of a private, non-profit corporation where the corporation is "a special instrumentality of government" created to implement specific legislation. See opinion of Attorney General to The Honorable John R. Gamble, Jr., N.C. House of Representatives, 1998 N.C.A.G. 34 (7/30/98).

## Sec. 7. Suspending laws.

All power of suspending laws or the execution of laws by any authority, without the consent of the representatives of the people, is injurious to their rights and shall not be exercised.

**History.** — The provisions of this section are similar to those of Art. I, § 9, Const. 1868.

### CASE NOTES

**Cited** in State ex rel. Martin v. Preston, 325 N.C. 438, 385 S.E.2d 473 (1989); Seaton v. Owens, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 22298 (M.D.N.C. Dec. 8, 2003).

## Sec. 8. Representation and taxation.

The people of this State shall not be taxed or made subject to the payment of any impost or duty without the consent of themselves or their representatives in the General Assembly, freely given.

**History.** — The provisions of this section are similar to those of Art. I, § 23, Const. 1868.

**Legal Periodicals.** — For note on taxation and revenue bonds to finance low-income housing, see 49 N.C.L. Rev. 830 (1971).

CASE NOTES

**Drainage district assessments** are not taxes. Northampton County Drainage Dist. Number One v. Bailey, 326 N.C. 742, 392 S.E.2d 352 (1990).

**The order of the Supreme Court establishing the Client Security Fund and requiring annual payments by attorneys to the Fund** was an essential corollary to the court's function, was required for the proper administration of justice, and did not violate the Constitution. Beard v. North Carolina State Bar, 320 N.C. 126, 357 S.E.2d 694 (1987).

**Applied** in Moore v. Swinson, 58 N.C. App. 714, 294 S.E.2d 381 (1982).

**Cited** in In re Arcadia Dairy Farms, Inc., 289 N.C. 456, 223 S.E.2d 323 (1976); Biltmore Co. v. Hawthorne, 32 N.C. App. 733, 233 S.E.2d 606 (1977); In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979); State ex rel. Martin v. Preston, 325 N.C. 438, 385 S.E.2d 473 (1989); Royal v. State, 153 N.C. App. 495, 570 S.E.2d 738, 2002 N.C. App. LEXIS 1167 (2002).

## Sec. 9. Frequent elections.

For redress of grievances and for amending and strengthening the laws, elections shall be often held.

**History.** — The provisions of this section are similar to those of Art. I, § 28, Const. 1868.

## Sec. 10. Free elections.

All elections shall be free.

**History.** — The provisions of this section are similar to those of Art. I, § 10, Const. 1868.

CASE NOTES

*Editor's Note. — The case cited below was decided under former Art. I, § 10, Const. 1868.*

**Elector May Not Be Required to Take Oath Violating This Section.** — Membership in a party and the right to participate in its primary may not be denied an elector because he refuses to take an oath to vote in a manner which violates this constitutional provision. Clark v. Meyland, 261 N.C. 140, 134 S.E.2d 168 (1964).

**Ballot Access Restriction.** — The ten percent (10%) numerical signature requirement contained in G.S. 163-122(a)(3) is an unconstitutional ballot access restriction for unaffiliated candidates in violation of the U.S. Const., Amend. I and XIV and N.C. Const., Art. I, § 19 and this section. Obie v. North Carolina State Bd. of Elections, 762 F. Supp. 119 (E.D.N.C. 1991).

**Cited** in Royal v. State, 153 N.C. App. 495, 570 S.E.2d 738, 2002 N.C. App. LEXIS 1167 (2002).

## Sec. 11. Property qualifications.

As political rights and privileges are not dependent upon or modified by property, no property qualification shall affect the right to vote or hold office.

**History.** — The provisions of this section are similar to those of Art. I, § 22, Const. 1868.

CASE NOTES

**Cited** in State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972); Texfi Indus., Inc. v. City of Fayetteville, 44 N.C. App. 268, 261 S.E.2d 21 (1979); Royal v. State, 153 N.C. App. 495, 570 S.E.2d 738, 2002 N.C. App. LEXIS 1167 (2002).

## Sec. 12. Right of assembly and petition.

The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances; but secret political societies are dangerous to the liberties of a free people and shall not be tolerated.

**History.** — The provisions of this section are similar to those of Art. I, § 25, Const. 1868, as amended by the Convention of 1875.

### CASE NOTES

**City Parade Ordinance Held Constitutional.** — Where a city's parade ordinance was codified under the general heading of traffic, its language was directed to the time, place and manner of parades, and it neither imposed restraint upon speech concerning political matters or matters of public concern nor contained any inkling of discrimination against defendant, who was arrested for participating in a parade without a permit, the ordinance was constitutionally valid. State v. Frinks, 284 N.C. 472, 201 S.E.2d 858 (1974).

**Cited** in City of Winston-Salem v. Chauffeurs Local Union 391, 470 F. Supp. 442 (M.D.N.C. 1979); State v. Neville, 108 N.C. App. 330, 423 S.E.2d 496 (1992); Babb v. Harnett County Bd. of Educ., 118 N.C. App. 291, 454 S.E.2d 833 (1995); Royal v. State, 153 N.C. App. 495, 570 S.E.2d 738, 2002 N.C. App. LEXIS 1167 (2002); State v. Hunt, 357 N.C. 257, 582 S.E.2d 593, 2003 N.C. LEXIS 746 (2003); Sheaffer v. County of Chatham, 337 F. Supp. 2d 709, 2004 U.S. Dist. LEXIS 18982 (M.D.N.C. 2004).

## Sec. 13. Religious liberty.

All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience.

**History.** — The provisions of this section are similar to those of Art. I, § 26, Const. 1868, as amended in 1946.

**Legal Periodicals.** — For case law survey as to freedom of religion, see 45 N.C.L. Rev. 862 (1967).

For comment, "The State and Sectarian Education: Regulation to Deregulation," see 1980 Duke L.J. 801.

For note on state regulation of public solicitation for religious purposes, see 16 Wake Forest L. Rev. 996 (1980).

For note, "Delconte v. State: Some Thoughts on Home Education," see 64 N.C.L. Rev. 1302 (1986).

For article, "The Concept of Religion in State Constitutions," see 8 Campbell L. Rev. 437 (1986).

For note, "Balancing the Welfare of Children with the Rights of Parents: Peterson v. Rogers and the Role of Religion in Custody Disputes," see 73 N.C.L. Rev. 1271 (1995).

### CASE NOTES

***Editor's Note.*** — *Some of the cases cited below were decided under former Art. I, § 26, Const. 1868, as amended in 1946.*

**G.S. 105-278.6A, (formerly G.S. 105-275(32)(v) is unconstitutional** as violative of the prohibition against the establishment of religion as found in both this section and the First Amendment to the U.S. Constitution because it distinguishes between homes that are religiously affiliated and those that perform essentially the same functions but lack any religious affiliation. In re Springmoor, Inc., 125 N.C. App. 184, 479 S.E.2d 795 (1997), aff'd, 348 N.C. 1, 498 S.E.2d 177 (1998).

**Standing.** — Non-profit corporation which ran a retirement community for the aged, sick, and infirm, and which sought a personal property tax exemption on certain items owned by it and used in the operation of the home, had standing to challenge the constitutionality of G.S. 105-278.6A, (formerly G.S. 105-275(32)). In re Springmoor, Inc., 125 N.C. App. 184, 479 S.E.2d 795 (1997), aff'd, 348 N.C. 1, 498 S.E.2d 177 (1998).

**Secular Neutrality Mandated.** — Construed together, this section and N.C. Const., Art. I, § 19 and U.S. Const., Amend. I may be said to coalesce into a singular guarantee of freedom of religious profession and worship, as well as an equally firmly established separation of church and state. The legislature oversteps the bounds of this separation when it enacts a regulatory scheme which, whether in purpose, substantive effect, or administrative procedure, tends to "control or interfere" with religious affairs, or to "discriminate" along religious lines, or to constitute a law "respecting" the establishment of religion. Stated simply, the constitutional mandate is one of secular neutrality toward religion. Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980).

**This Section Protects Freedom to Exercise One's Religion.** — The term "rights of conscience," as used in this section, must be construed in relation to the right to worship God according to the dictates of one's own conscience. Consequently, the freedom protected by this provision is no more extensive than the freedom to exercise one's religion, which is protected by U.S. Const., Amend. I. In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967).

**But It Does Not Protect One's Sense of Ethics.** — This constitutional provision does not provide immunity for every act which one's conscience permits him to do, or even for every act which one's conscience classifies as required by ethics, nor shield the defendant from a command by the State that he do an act merely because he believes it morally or ethically wrong. It is the right to exercise one's religion, or lack of it, which is protected, not one's sense of ethics. In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967).

**Protection Not Limited to Clergymen and Organized Religious Groups.** — The freedoms protected by this constitutional provision are not limited to clergymen. Indeed, they are not limited to members of an organized religious body, and consequently are not contingent upon proof that others share the views of the individual who asserts his own constitutional right to the freedom to exercise his religion or "right of conscience." In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967).

**Unorthodox Religious Beliefs Are Protected.** — This constitutional provision extends its protection to the unorthodox, unusual and unreasonable belief as truly as to the belief shared by many. In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967).

**But freedom to exercise one's religious beliefs is not absolute.** In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967).

**And use of drugs may be prohibited** notwithstanding the user's asserted belief that such use is required by Divine Law. In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967).

**Religious Freedom Is Impaired by Governmental Compulsion of That Which Religious Belief Forbids.** — The free exercise of religion is impaired not only by the governmental prohibition of that which one's religious belief demands, but also by governmental compulsion of that which one's religious belief forbids. In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967).

**And Government May Not Force One to Act Contrary to Religious Belief in Absence of "Compelling State Interest".** — The liberty secured by U.S. Const., Amend. I and by this section is so basic and fundamental that one may not be compelled by governmental action to do that which is contrary to his religious belief in the absence of a "compelling State interest in the regulation of a subject within the State's constitutional power to regulate." In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967).

**Effective operation of courts of justice is a "compelling State interest."** In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967).

**And It Overrides Belief of Witness Who Refuses to Testify for Religious Reasons.** — The "compelling interest" of the State in the rendering of a just judgment in accordance with its law overrides the incidental infringement upon the religious belief of a witness that for him to testify is wrong. In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967).

The State has a compelling interest that a person called as a witness should be sworn and should testify in the administration of justice between the State and one charged with a serious offense, and therefore a minister called as a witness in such prosecution may be held in contempt of court upon his refusal to be sworn as a witness, notwithstanding his assertion that his refusal is a matter of religious conscience. In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967).

**Counsel may not attack credibility of a witness because of the witness's religious beliefs** or rights of conscience. State v. James, 322 N.C. 320, 367 S.E.2d 669 (1988).

**Prosecutor's argument as to defendant's credibility held not to violate this section** or G.S. 8C-1, Rules 603 or 610, despite an indirect reference to defendant's affirmation as a witness. State v. James, 322 N.C. 320, 367 S.E.2d 669 (1988).

**The legal tribunals of the State have no jurisdiction over purely ecclesiastical questions** and controversies, for there is a constitutional guarantee of freedom of religious profession and worship, as well as an equally firmly established separation of church and State, but the courts do have jurisdiction as to civil, contract and property rights which are involved in, or arise from, a church controversy. Reid v. Johnston, 241 N.C. 201, 85 S.E.2d 114 (1954); Atkins v. Walker, 19 N.C. App. 119, 198 S.E.2d 101, aff'd, 284 N.C. 306, 200 S.E.2d 641 (1973); African Methodist Episcopal Zion Church v. Union Chapel A.M.E. Zion Church, 64 N.C. App. 391, 308 S.E.2d 73 (1983), cert. denied, 310 N.C. 308, 312 S.E.2d 649 (1984).

**Civil Court's Jurisdiction Over Church's Termination of Members.** — While a court did not have jurisdiction to consider ecclesiastical matters in a church's governance of its membership, such as whether the grounds in a termination letter to two church members were accurate and whether the termination was conducted in a fair and reasonable manner and in good faith, the two terminated members had a property interest in their membership, and the court could consider whether the church's bylaws were properly adopted and followed by the church in the termination of the members. Tubiolo v. Abundant Life Church, Inc., 167 N.C. App. 324, 605 S.E.2d 161, 2004 N.C. App. LEXIS 2166 (2004), cert. denied, — U.S. —, 126 S. Ct. 350, 163 L. Ed. 2d 59 (2005).

**How Civil Courts Must Decide Church Property Disputes.** — Civil courts must decide church property disputes without inquiring into underlying controversies over religious doctrines and without in any way basing their decisions upon any determination made upon such an inquiry. Atkins v. Walker, 19 N.C. App. 119, 198 S.E.2d 101, aff'd, 284 N.C. 306, 200 S.E.2d 641 (1973).

Appellate court erred in dismissing the pastor's appeal of the trial court's denial of the pastor's motion to dismiss a lawsuit brought against the pastor, secretary, and board chairman over whether they were diverting church funds because no neutral principles of law existed to resolve the church members' claims that the pastor, secretary, and board chairman were making improper use of the funds, the courts had to defer to the church's internal governing body, the Council for Ministry, to avoid becoming impermissibly entangled in the dispute, in violation of the First Amendment and the North Carolina Constitution. Harris v. Matthews, 361 N.C. 265, 643 S.E.2d 566, 2007 N.C. LEXIS 414 (2007).

**In a child custody proceeding, the court cannot base its findings on the preferability of any particular faith** or religious instruction. Dean v. Dean, 32 N.C. App. 482, 232 S.E.2d 470 (1977).

**But the spiritual welfare of a child is a factor that may be considered** by the trial court in making a custody determination. Dean v. Dean, 32 N.C. App. 482, 232 S.E.2d 470 (1977).

**Biological Parents' Rights Outweighed Adoptive Parents' Rights.** — Biological parents constitutionally-protected paramount right to custody, care, and control of their child, including control over his associations, outweighed adoptive parents' interests, including their right to freedom of religion; therefore, inquiry into plaintiffs' religious beliefs, if error, was harmless. Petersen v. Rowe, 337 N.C. 397, 445 S.E.2d 901 (1994).

**A law requiring the observance of Sunday as a day of rest and relaxation** does not cease to be a reasonable exercise of the police power of the State, merely because it is in harmony with the religious beliefs of most Christian denominations. Raleigh Mobile Home Sales, Inc. v. Tomlinson, 276 N.C. 661, 174 S.E.2d 542 (1970).

The choice of Sunday by the legislature as a day of rest and relaxation does not render statute unconstitutional, as a law establishing a religion or interfering with freedom of worship, merely because other persons are required by their religious convictions to rest from their labors on a different day of the week, or because, having no religious convictions, they consider Sunday as an exceptionally promising day for business. Raleigh Mobile Home Sales, Inc. v. Tomlinson, 276 N.C. 661, 174 S.E.2d 542 (1970).

The provisions of this section do not deprive the legislature of authority to prohibit by a statute, otherwise valid, the carrying on of and engaging in, on Sunday, any and all labor and the operation of industrial and commercial pursuits, except for works of necessity and acts which, themselves, are in exercise of the constitutional right to worship. Moreover, the legislature may delegate this power to municipalities. Raleigh Mobile Home Sales, Inc. v. Tomlinson, 276 N.C. 661, 174 S.E.2d 542 (1970).

Ordinance prohibiting certain activities on Sunday held not in contravention of this section. State v. McGee, 237 N.C. 633, 75 S.E.2d 783, appeal dismissed, 346 U.S. 802, 74 S. Ct. 50, 98 L. Ed. 334, reh'g denied, 346 U.S. 918, 74 S. Ct. 272, 98 L. Ed. 413 (1953).

**A municipal ordinance prohibiting the handling of venomous and poisonous reptiles** in such a manner as to endanger the public health, safety and welfare would not be held invalid upon defendants' contention that the ordinance interfered with the exercise of their religious practices. State v. Massey, 229

N.C. 734, 51 S.E.2d 179, appeal dismissed, 336 U.S. 942, 69 S. Ct. 813, 93 L. Ed. 1099, reh'g denied, 336 U.S. 971, 69 S. Ct. 939, 93 L. Ed. 1121 (1949).

**Injunction Against Former Pastor.** — Judgment by default final restraining defendant, whom a majority of the members of a church had voted not to employ as its pastor after the year 1959, from appearing at the church after the year 1959 and acting or attempting to act as its pastor at a religious service or at any other church meeting, so long as he was not its pastor, violated no rights guaranteed to him by N.C. Const., Art. I. Collins v. Simms, 254 N.C. 148, 118 S.E.2d 402 (1961). See also, Collins v. Simms, 257 N.C. 1, 125 S.E.2d 298 (1962).

**Applied** in Heritage Village Church & Missionary Fellowship, Inc. v. State, 40 N.C. App. 429, 253 S.E.2d 473 (1979).

**Cited** in Royal v. State, 153 N.C. App. 495, 570 S.E.2d 738, 2002 N.C. App. LEXIS 1167 (2002).

### OPINIONS OF ATTORNEY GENERAL

**An educational program in which clergymen are trained** at the expense of the State in total health care counseling in order to offer free counseling services in their communities does not violate either U.S. Const., Amend. I or this section. See opinion of Attorney General to Mr. Patrick Guyton, Community Development Specialist, Department of Human Resources, 43 N.C.A.G. 189 (1973).

## Sec. 14. Freedom of speech and press.

Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.

**History.** — The provisions of this section are similar to those of Art. I, § 20, Const. 1868.

**Legal Periodicals.** — For article analyzing the evolution of free speech rights under U.S. Const., Amend. I in North Carolina, see 4 Campbell L. Rev. 243 (1982).

For article, "Of Libel, Language, and Law: New York Times v. Sullivan at Twenty-Five," see 68 N.C.L. Rev. 273 (1990).

For note, Striking an Unequal Balance: The Fourth Circuit Holds that Public School Teachers Do Not Have First Amendment Rights to Set Curricula in Boring v. Buncombe County Board of Education, see 77 N. C. L. Rev. 1960 (1999).

For article, "A Kantian Right of Publicity," see 1999 Duke L.J. 383.

For article, "Political Patronage and North Carolina Law: Is Political Conformity With the Sheriff a Permissible Job Requirement for Deputies?," see 79 N.C.L. Rev. 1743 (2001).

For article, "The Rising Tide of North Carolina Constitutional Protection in the New Millenium," see 27 Campbell L. Rev. 223 (2005).

### CASE NOTES

I. General Consideration.
II. Unprotected Speech.
III. Restrictions on Exercise of Rights.

### I. GENERAL CONSIDERATION.

***Editor's Note.*** *— Some of the cases cited below were decided under former Art. I, § 20, Const. 1868.*

**This section is viewed in the light of the doctrine of "qualified privilege."** Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

**The basis of the privilege is the public interest** in the free expression and communication of ideas. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

**This section and N.C. Const., Art. I, § 19 do not require** that a statewide standard be judicially incorporated into G.S. 14-190.1 in order to render the statute facially valid. State v. Mayes, 323 N.C. 159, 371 S.E.2d 476 (1988), cert. denied, 488 U.S. 1009, 109 S. Ct. 792, 102 L. Ed. 2d 784 (1989).

**A citizen may assert a direct claim** for abridgement of her state constitutional free speech rights under the state constitution only absent an adequate state remedy. Evans v. Cowan, 132 N.C. App. 1, 510 S.E.2d 170 (1999).

**Previous Federal Claim Does Not Render State Claim Res Judicata.** — Claims asserted in the State Court on the basis of this section of the North Carolina Constitution were not identical to the claims asserted by the plaintiff in the Federal Court on the basis of freedom of speech and press under the United States Constitution and dismissal of the state claims on the basis of res judicata was error. Evans v. Cowan, 122 N.C. App. 181, 468 S.E.2d 575 (1996), cert. denied, 343 N.C. 510, 471 S.E.2d 634, aff'd, 345 N.C. 177, 477 S.E.2d 926 (1996).

**The words "shall never be restrained"** are a direct personal guarantee of each citizen's right of freedom of speech. Corum v. University of N.C. ex rel. Bd. of Governors, 330 N.C. 761, 413 S.E.2d 276, reh'g denied, 331 N.C. 558, 418 S.E.2d 664, cert. denied, 506 U.S. 985, 113 S. Ct. 493, 121 L. Ed. 2d 431 (1992).

**Applied** in Heritage Village Church & Missionary Fellowship, Inc. v. State, 40 N.C. App. 429, 253 S.E.2d 473 (1979); State v. Barrett, 58 N.C. App. 515, 293 S.E.2d 896 (1982); Kaplan v. Prolife Action League, 111 N.C. App. 1, 431 S.E.2d 828 (1993).

**Cited** in Sparrow v. Goodman, 376 F. Supp. 1268 (W.D.N.C. 1974); Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980); State v. Johnson, 304 N.C. 680, 285 S.E.2d 792 (1982); Renwick v. News & Observer Publishing Co., 63 N.C. App. 200, 304 S.E.2d 593 (1983); Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986); State v. Anderson, 322 N.C. 22, 366 S.E.2d 459 (1988); Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 386 S.E.2d 200 (1989); Corum v. University of N.C., 97 N.C. App. 527, 389 S.E.2d 596 (1990); Lenzer v. Flaherty, 106 N.C. App. 496, 418 S.E.2d 276 (1992); Shell v. Wall, 808 F. Supp. 481 (W.D.N.C. 1992); Babb v. Harnett County Bd. of Educ., 118 N.C. App. 291, 454 S.E.2d 833 (1995); North Carolina Council of Churches v. State, 120 N.C. App. 84, 461 S.E.2d 354 (1995); Harter v. Vernon, 953 F. Supp. 685 (M.D.N.C. 1996); Carter v. Good, 951 F. Supp. 1235 (W.D.N.C. 1996); Caudill v. Dellinger, 129 N.C. App. 649, 501 S.E.2d 99 (1998); Edwards v. City of Goldsboro, 178 F.3d 231 (4th Cir. 1999); Glenn-Robinson v. Acker, 140 N.C. App. 606, 538 S.E.2d 601, 2000 N.C. App. LEXIS 1258 (2000); Love-Lane v. Martin, 355 F.3d 766, 2004 U.S. App. LEXIS 937 (4th Cir. 2004); Sheaffer v. County of Chatham, 337 F. Supp. 2d 709, 2004 U.S. Dist. LEXIS 18982 (M.D.N.C. 2004); Craven v. SEIU COPE, 188 N.C. App. 814, 656 S.E.2d 729, 2008 N.C. App. LEXIS 266 (2008); Petroleum Traders Corp. v. State, 190 N.C. App. 542, 660 S.E.2d 662, 2008 N.C. App. LEXIS 1003 (2008).

## II. UNPROTECTED SPEECH.

**Racial Slur Is Unprotected Speech.** — The use of the word "nigger" by district attorney squarely fell within the category of unprotected speech defined by the Supreme Court. In re Spivey, 345 N.C. 404, 480 S.E.2d 693 (1997).

**Use of "Fighting Words" Not Protected.** — District attorney's abusive verbal attack on African-American man which gave rise to the inquiry removing him from office was not protected speech under the First Amendment. Instead, when taken in context, his repeated references to victim as a "nigger" presented a classic case of the use of "fighting words" tending to incite an immediate breach of the peace which are not protected by either the Constitution of the United States or the Constitution of North Carolina. In re Spivey, 345 N.C. 404, 480 S.E.2d 693 (1997).

**G.S. 163-274(7),** prohibiting anonymous, derogatory charges against candidates for primary or general elections, does not violate the free speech guarantees of the U.S. Const., Amend. I, or this section. State v. Petersilie, 334 N.C. 169, 432 S.E.2d 832 (1993).

**Commercial Speech Subject to Reasonable Time, Place and Manner Restrictions.** — While it is true that commercial speech is protected under U.S. Const., Amend. I and under this section, it is nonetheless true that commercial speech, like other varieties of speech, is subject to reasonable time, place, and manner restrictions. County of Cumberland v. Eastern Fed. Corp., 48 N.C. App. 518, 269 S.E.2d 672 (1980).

**Balancing of Freedom of Speech and Press and Right to Fair Trial.** — The framers of the federal and State Constitutions gave no priorities to the fundamental guarantees of freedom of speech and of the press and the guarantee that every criminal defendant shall receive a fair trial, but left to the courts the delicate task of balancing the defendant's constitutionally guaranteed right to a fair trial against the constitutional guarantees of freedom of speech and freedom of the press. State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981).

**Communication which constitutes harassment of jurors is not protected speech.** Burgess v. Busby, 142 N.C. App. 393, 544 S.E.2d 4, 2001 N.C. App. LEXIS 146 (2001).

**Burden of Justifying "Gag" Rule.** — Even pervasive, adverse publicity does not inevitably lead to an unfair trial, and any prior restraint on expression comes to the courts with a heavy presumption against its constitutional validity; thus, one seeking to impose a "gag" rule carries a heavy burden of showing justification for the imposition of such a rule. State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981).

**Plaintiff's free speech claim failed** where her communication focused on her personal trials and tribulations and relief sought therefor and, thus, essentially addressed a private grievance rather than a public concern, and where plaintiff failed to adduce evidence that she suffered any tangible job detriment in retaliation for her complaints. DeWitt v. Mecklenburg County, 73 F. Supp. 2d 589 (W.D.N.C. 1999).

### III. RESTRICTIONS ON EXERCISE OF RIGHTS.

**Right to Comment on Matters of Public Interest.** — Everyone has a right to comment on matters of public interest and concern, provided he does so fairly and with an honest purpose. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

**Such Comments Not Libelous Unless Written Maliciously.** — Such comments or criticisms are not libelous, however severe in their terms, unless they are written maliciously. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

**North Carolina's standard of fault for speech regarding a matter of public concern, where the plaintiff is a private individual, is negligence,** as such a standard strikes the sensitive balance between First Amendment tension regarding speech of public concern, and maintaining the reputation and livelihoods of private individuals who are somehow harmed by the dissemination of this information. Neill Grading & Constr. Co. v. Lingafelt, 168 N.C. App. 36, 606 S.E.2d 734, 2005 N.C. App. LEXIS 160 (2005).

**Recovery for Defamation Not Allowed Where Public Interest Outweighs State's Interest.** — Where the public interest is sufficient to outweigh the interest of the State in protecting the individual or corporate plaintiff from damage to his or its reputation or social or business relationships, the law does not allow recovery of damages, actual or punitive, occasioned by a defamatory speech or publication. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

**When Qualified Privilege Is Applicable.** — Qualified privilege will apply to a statement made or article written in good faith, without actual malice (as defined by the law of North Carolina), touching upon a topic in which the speaker or publisher has an interest, or in respect to which he has a duty, public, personal, or private, either legal, judicial, political, moral, or social. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

**Whether a publication is privileged is a question of law** to be determined by the court. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

**Qualified Privilege Not Extended to Sports Reporting.** — The North Carolina courts have not, as of yet, extended the doctrine of qualified privilege to the field of sports reporting, nor is there any indication that they will do so in the future. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

**Broadcast of Execution.** — Plaintiffs (prisoner and television show host) did not have a right under either the First or Fourteenth Amendments to the United States Constitution or under this section to audiotape or videotape prisoner/plaintiff's scheduled execution. Under G.S. 15-190 the execution was under the supervision and control of the warden and, as a matter of law, neither the Secretary of the North Carolina Department of Correction, nor the warden could be mandamused to permit the requested audiotaping or videotaping. Lawson v. Dixon, 336 N.C. 312, 446 S.E.2d 799 (1994).

**Malice Necessary to Overcome Qualified Privilege Distinguished from "Actual Malice".** — The malice necessary under North Carolina law to overcome the shield of qualified privilege should not be confused with the "actual malice" standard which has been developed from the freedom of the press decisions under U.S. Const., Amend. I. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

**North Carolina equates actual malice with reckless or careless publication.** Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

**Falsehood of Statement Not Sufficient to Establish Malice.** — In cases of qualified privilege, the falsehood of the statement will not of itself be sufficient to establish malice, for there is a presumption that the publication was made bona fide. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

**County Sign Ordinance Upheld.** — Provisions of a county sign ordinance did not infringe upon defendants' rights of free speech where the ordinance did not attempt to censor the content of signs or to impose any prior restraints on expressions of any kind. County of Cumberland v. Eastern Fed. Corp., 48 N.C. App. 518, 269 S.E.2d 672, cert. denied, 301 N.C. 527, 273 S.E.2d 453 (1980).

**City Parade Ordinance Constitutional.** — Where a city's parade ordinance was codified under the general heading of traffic, its language was directed to the time, place and manner of parades, and it neither imposed restraint upon speech concerning political matters or matters of public concern nor contained any inkling of discrimination against defendant, who was arrested for participating in a parade without a permit, the ordinance was constitutionally valid. State v. Frinks, 284 N.C. 472, 201 S.E.2d 858 (1974).

**Accosting of customers in a private parking lot** at a privately owned and operated mall to sign a petition, which was a type of solicitation prohibited by the owners of the mall, was not an exercise of free speech protected by U.S. Const., Amend. I or by N.C. Const., Art. I. State v. Felmet, 302 N.C. 173, 273 S.E.2d 708 (1981).

**Editorial Comment.** — Editor of a city paper who commented in a sarcastic manner concerning action of city council "with the verbal backing of the mayor" in voting for purchase of a lot by the city did not abuse privilege granted by this section. Yancey v. Gillespie, 242 N.C. 227, 87 S.E.2d 210 (1955).

**A contract entered into upon the sale of a newspaper,** providing that the seller would not, for a period of ten years, be connected with any newspaper in the State without obtaining the consent of the purchaser, was not void under this section. Cowan v. Fairbrother, 118 N.C. 406, 24 S.E. 212 (1896).

Newspaper companies were entitled to summary judgment on their action challenging an airport operator's ban on newspaper racks because the ban on the installation of news racks within the terminals substantially burdened the newspaper companies' expressive conduct within that public place, and the operator failed to advance sufficiently powerful interests to justify the burden on protected expression. News & Observer Publ. Co. v. Raleigh-Durham Airport Auth., 588 F. Supp. 2d 653, 2008 U.S. Dist. LEXIS 99295 (E.D.N.C. 2008).

**Employee's Right to Free Speech.** — The test of whether speech that allegedly leads to the discharge of an employee involves a matter of public concern is whether the employee was speaking as a citizen about matters of public concern, or as an employee on matters of personal interest. Evans v. Cowan, 132 N.C. App. 1, 510 S.E.2d 170 (1999).

Administrator's claims under 42 U.S.C.S. § 1983 against the school board for violation of the administrator's free speech rights under the North Carolina Constitution failed as (1) the administrator's speech involved not only disciplinary practices and the use of a time-out room, but also the administrator's disputes with a supervisor so that the speech was more in the capacity as a public school administrator than as a private citizen; and (2) the school board's interest in maintaining effective functioning of the school by removing the administrative, a disruptive and dividing influence, far outweighed the administrator's interest in First Amendment expression. Love-Lane v. Martin, 201 F. Supp. 2d 566, 2002 U.S. Dist. LEXIS 17219 (M.D.N.C. 2002).

Former at-will employee's claims that alleged that the employee was fired for opposing the employer's unlawful activities, insisting on proper reporting, and demanding the payment of past wages due to employees were dismissed because North Carolina rejected free speech abridgment claims against private sector employers under the North Carolina constitution, which did not recognize a remedy for private sector employees against their employers. Hardin v. Belmont Textile Mach., Co., — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 54452 (W.D.N.C. Aug. 3, 2006).

**No Right to Recover Against Employer in Individual Capacity.** — A public employee who suffers retaliation for his protected speech has a cause of action against his employer directly under this section, and even though sovereign immunity does not bar such a suit, the state constitution does not create a right to recovery against a public employer in his individual capacity. Myers v. Town of Landis, 957 F. Supp. 762 (M.D.N.C. 1996).

**Establishing Claim of Retaliatory Discharge.** — To properly advance a claim that an employee was discharged in retaliation for exercising her free speech rights under the State Constitution, the speech at issue first must involve a matter of public concern, and, second, such protected speech or activity must have been the motivating or "but for" cause for the employee's discharge. Evans v. Cowan, 132 N.C. App. 1, 510 S.E.2d 170 (1999).

**Private Employment.** — Plaintiff's refusal to remove a sticker of the Confederate flag from his tool box, which was carried out in private employment, was not constitutionally protected activity. Johnson v. Mayo Yarns, Inc., 126 N.C. App. 292, 484 S.E.2d 840 (1997), cert. denied, 346 N.C. 547, 488 S.E.2d 802 (1997).

**Waiver of Right to Freedom of Speech.** — Parents offered no evidence to show that their First Amendment right to freedom of speech was not knowingly, voluntarily, and intelligently waived. The parents and their attorney agreed to and executed the mediated settlement agreement, and specifically agreed to the paragraphs which limited their speech regarding the deputy. Estate of Barber v. Guilford County Sheriff's Dep't, 161 N.C. App. 658, 589 S.E.2d 433, 2003 N.C. App. LEXIS 2256 (2003).

## Sec. 15. Education.

The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.

**History.** — The provisions of this section are similar to those of Art. I, § 27, Const. 1868.

**Legal Periodicals.** — For comment on state regulation of private religious schools, see 16 Wake Forest L. Rev. 405 (1980).

For article analyzing the evolution of first amendment speech rights in North Carolina, see 4 Campbell L. Rev. 243 (1982).

For note, "Delconte v. State: Some Thoughts on Home Education," see 64 N.C.L. Rev. 1302 (1986).

For article, "Constitutional Rights of Students, Their Families, and Teachers in the Public Schools," see 10 Campbell L. Rev. 353 (1988).

For article, "Of Libel, Language, and Law: New York Times v. Sullivan at Twenty-Five," see 68 N.C.L. Rev. 273 (1990).

For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

For note on Leandro v. State, 346 N.C. 336, 488 S.E.2d 249 (1997), annotated under this section, see 76 N.C.L. Rev. 1481 (1998).

For article, "Leandro v. State and the Constitutional Limitation on School Suspensions and Expulsions in North Carolina" see 83 N.C. L. Rev. 1507 (2500).

## CASE NOTES

**Mandate of Section.** — The provisions of this section and N.C. Const., Art. IX, § 2(1), with the activating statutes, embody a mandate for the establishment of free public schools in North Carolina, the untrammeled privilege of education for all students, and the duty of the State to maintain and guard that right, while guaranteeing equal opportunities to all students. Webster v. Perry, 512 F.2d 612 (4th Cir. 1975).

**Challenge to School Financing.** — Action for declaratory and injunctive relief brought by minors who were or would be in the future enrolled in public schools in the county, and their parents or legal guardians, alleging that the present statutory system of financing public schools in this State resulted in inequities in educational programs and facilities between the public schools within that county, which had a relatively low tax base from which to draw funds, and those in other counties with relatively high tax bases, and that the operation of five separate school systems in that county prohibited effective use of facilities and staff and promoted inequitable use of State and local funds, thus depriving them of equal opportunity to a free public school education in violation of this section, N.C. Const., Art. I, §§ 1 and 19, and Art. IX, § 2(1), failed to allege facts entitling them to relief or conferring jurisdiction on the courts of this State. Britt v. North Carolina State Bd. of Educ., 86 N.C. App. 282, 357 S.E.2d 432, appeal dismissed, 320 N.C. 790, 361 S.E.2d 71 (1987).

**Fee waiver policy adopted by city board of education was unconstitutional** where it failed to establish mechanism by which the schools would affirmatively notify students and their parents of the availability of a waiver or reduction of the fee or by which the students or parents themselves might apply for a partial or complete exemption from the fee requirements, since the waiver policy did not fairly guarantee to low income and indigent students their right of equal access to the educational opportunities available at their schools and did not accord procedural due process to such students. Sneed v. Greensboro City Bd. of Educ., 299 N.C. 609, 264 S.E.2d 106 (1980).

**No Private Right of Action for Damages.** — No North Carolina appellate court has yet recognized a private right of action for damages under the North Carolina Constitution against a local board of education for the denial of the privilege of education. Frye v. Brunswick County Bd. of Educ., 612 F. Supp. 2d 694, 2009 U.S. Dist. LEXIS 18084 (E.D.N.C. 2009).

**No Right to Disseminate Pornography.** — The right to an education does not involve the right to disseminate material which, but for its use in an educational context, would otherwise be deemed obscene. Any serious educational value of sexually-explicit materials must be derived, in turn, from some serious literary, artistic, political, or scientific value. State v. Watson, 88 N.C. App. 624, 364 S.E.2d 683, cert. denied, 322 N.C. 485, 370 S.E.2d 235 (1988).

**Discipline of Disabled Student Proper.** — Plaintiffs, student's parents, offered no evidence to show a violation of any North Carolina statute or the North Carolina Constitution where student diagnosed with attention deficit hyperactivity disorder admitted that he had a gun clip with live bullets in school and he was subjected to external school suspension, his parents attended and participated in disciplinary proceedings, and he was assigned to management school which could accommodate his specialized needs. Glen ex rel. Glen v. Charlotte-Mecklenburg Sch. Bd. of Educ., 903 F. Supp. 918 (W.D.N.C. 1995).

**Sound Basic Education.** — Article I, § 15 and Art. IX, § 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools. Leandro v. State, 346 N.C. 336, 488 S.E.2d 249, 1996 N.C. App. LEXIS 201 (1997).

For purposes of our Constitution, a sound basic education will provide the student with at least: (1) sufficient ability to read, write, and speak English and a sufficient knowledge of fundamental math and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history and basic economic and political systems to enable the student to make informed choices regarding personal issues or issues that affect the community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; (4) and sufficient academic and social skills to enable the student to compete on an equal basis with others in further formal education or gainful employment. Leandro v. State, 346 N.C. 336, 488 S.E.2d 249, 1996 N.C. App. LEXIS 201 (1997).

**Equal Funding Not Required.** — Although the State Constitution requires that access to a sound basic education be provided equally in every school district, the equal opportunities clause of Art. IX, § 2(1) does not require substantially equal funding or educational advantages in all school districts. Leandro v. State, 346 N.C. 336, 488 S.E.2d 249, 1996 N.C. App. LEXIS 201 (1997).

**Cited** in Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972); Poovey v. Edmisten, 526 F. Supp. 759 (E.D.N.C. 1981); Duro v. District Att'y, 712 F.2d 96 (4th Cir. 1983); In re Roberts, 150 N.C. App. 86, 563 S.E.2d 37, 2002 N.C. App. LEXIS 389 (2002); Copper v. Denlinger, — N.C. App. —, 667 S.E.2d 470, 2008 N.C. App. LEXIS 1817 (2008).

## Sec. 16. Ex post facto laws.

Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted. No law taxing retrospectively sales, purchases, or other acts previously done shall be enacted.

**History.** — The provisions of this section are similar to those of Art. I, § 32, Const. 1868.

### CASE NOTES

***Editor's Note.*** — *Some of the cases cited below were decided under former Art. I, § 32, Const. 1868.*

**"Ex Post Facto Laws" Defined.** — An ex post facto law is one which either makes that a crime which was not a crime when the offense was committed or which imposes a heavier sentence than that which was prescribed by law at that time. State v. Broadway, 157 N.C. 598, 72 S.E. 987 (1911).

Whenever a retrospective statute applies to crimes and penalties, it is an ex post facto law. State v. Bond, 49 N.C. 9 (1856); State v. Bell, 61 N.C. 76 (1867).

**Section Applies Only to Criminal Statutes.** — Constitutional prohibitions of ex post facto legislation apply only to criminal proceedings. Stanback v. Citizens Nat'l Bank, 197 N.C. 292, 148 S.E. 313 (1929); North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981), modified and aff'd, 304 N.C. 627, 286 S.E.2d 89 (1982).

**And to Legislative, Not Judicial Action.** — There is no violation of the ex post facto clause in the Constitution of this State when a judicial decision is applied retroactively, because the clause applies to legislative and not judicial action. A party has no vested right in a decision of this State's Supreme Court. State v. Rivens, 299 N.C. 385, 261 S.E.2d 867 (1980); State v. Funderburk, 56 N.C. App. 119, 286 S.E.2d 884 (1982).

Retroactive application of the Robbins decision to the inmate's parole eligibility did not violate the constitutional prohibition against ex post facto laws because the Fair Sentencing Act, G.S. 15A-1340.1 to 1340.7 had undergone no substantive change subsequent to the commission of the inmate's crimes. Price v. Beck, 153 N.C. App. 763, 571 S.E.2d 247, 2002 N.C. App. LEXIS 1253, cert. denied, 356 N.C. 615, 575 S.E.2d 26 (2002).

**And Is Inapplicable to Attorney Disciplinary Proceedings.** — The doctrine of ex post facto laws does not apply to attorney disciplinary proceedings. North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981), modified and aff'd, 304 N.C. 627, 286 S.E.2d 89 (1982).

**Judicial Abrogation of Common-Law Criminal Principles.** — Whereas this decision holds that the year and a day rule as formerly utilized in murder prosecutions is no longer part of the common law of the state, to apply this decision abrogating the year and a day rule to permit defendant to be convicted of murder in the present case would, at the very least, permit his conviction upon less evidence than would have been required to convict him of that crime at the time the victim died and would, for that reason, violate the principles preventing the application of ex post facto laws. The judgment against defendant for second degree murder was vacated where defendant did not die within a year and a day of the acts in question; however, under the circumstances of this case, a conviction for involuntary manslaughter was appropriate. State v. Vance, 328 N.C. 613, 403 S.E.2d 495 (1991).

**An increase in a criminal penalty by legislative action may not constitutionally be applied retroactively.** State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

Where the punishment at the time of the offense was death or life imprisonment in the discretion of the jury, a change by the legislature to death alone would be ex post facto as to offenses committed prior to the change. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

Any legislation which increases the punishment for a crime between the time the offense was committed and the time a defendant is punished therefor is considered an invalid ex post facto law as applied to that defendant. State v. Wright, 302 N.C. 122, 273 S.E.2d 699 (1981).

**Nor May An Increase by Judicial Action.** — While the letter of the ex post facto clause is addressed to legislative action, the constitutional ban against the retroactive increase of punishment for a crime applies as well against judicial action having the same effect. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

**The habitual misdemeanor assault statute does not violate the prohibition on ex post facto laws** in either the United States Constitution, Art. I, § 10, cl. 1, or the North Carolina Constitution, Art. I, § 16, by increasing the penalty for these crimes after the offenses were committed; the statute does not impose punishment for previous crimes, but rather imposes an enhanced punishment for behavior occurring after the enactment of the statute, because of the repetitive nature of such behavior. State v. Smith, 139 N.C. App. 209, 533 S.E.2d 518, 2000 N.C. App. LEXIS 887 (2000).

**Timing of Acts and Result of Murder.** — Depriving defendant of the defense of the "year and a day" rule based on the Supreme Court's prospective abrogation of that rule in State v. Vance, 328 N.C. 613, 403 S.E.2d 495 (1991) violated the prohibition against ex post facto laws where the murderous acts occurred prior to the abrogation and the victim's death occurred after the abrogation but more than a year and a day after the murderous acts. State v. Robinson, 335 N.C. 146, 436 S.E.2d 125 (1993).

**Application of felony murder rule in automobile accident did not violate** prohibition against ex post facto laws. State v. Jones, 133 N.C. App. 448, 516 S.E.2d 405 (1999), aff'd in part, rev'd in part on other grounds, and remanded, 353 N.C. 159, 538 S.E.2d 917 (2000).

**A retrospective statute is not necessarily void.** Tabor v. Ward, 83 N.C. 291 (1880).

**Generally, the legislature may validate retrospectively** any proceeding which might have been authorized in advance, even though its act may operate to divest a right of action existing in favor of an individual or subject him to a loss he would otherwise not have incurred. This general rule is subject, however, to some exceptions. Anderson v. Wilkins, 142 N.C. 154, 55 S.E. 272 (1906).

**Although vested rights may not be affected by retroactive laws, contingent interests may be affected** thereby; thus, where there is a voluntary trust estate with the limitation over upon a contingent determinable at some future time as to the persons who take thereunder, the power of revocation of the trust given by G.S. 39-6 is not objectionable as falling within the constitutional inhibition. Stanback v. Citizens Nat'l Bank, 197 N.C. 292, 148 S.E. 313 (1929).

**Amendment made in 1991 to G.S. 122C-268.1(i) and 122C-276.1(c),** which required respondent to bear the burden of proof to show that he was no longer dangerous or mentally ill and opened the hearing to the public, were procedural changes that did not violate substantive rights or protections though they could have disadvantaged respondent. Therefore, there was no violation of the Ex Post Facto Clause. In re Hayes, 111 N.C. App. 384, 432 S.E.2d 862, appeal dismissed, 335 N.C. 173, 436 S.E.2d 376 (1993).

**Application Only to Tax Statutes Taxing Retrospectively.** — This section applies only to tax statutes "taxing retrospectively sales, purchases, or other acts previously done." Chapter 1052 of Session Laws 1987 (Reg. Sess., 1988) is not a tax or revenue statute within the meaning of N.C. Const., Art. II, § 23. North Carolina E. Mun. Power v. Wake County, 100 N.C. App. 693, 398 S.E.2d 486 (1990), cert. denied, 329 N.C. 270, 407 S.E.2d 838 (1991).

**Unemployment Compensation Taxes.** — Taxes levied for the year 1936 under the Unemployment Compensation Act, G.S. 96-1 et seq., were void as violating this section. Unemployment Comp. Comm'n v. Wachovia Bank & Trust Co., 215 N.C. 491, 2 S.E.2d 592 (1939).

**Tax Not Retrospective.** — Contention that as to appellant G.S. 105-282.7 was a retrospective tax in violation of this section was without merit, where the statute was ratified in 1981 and did not become effective until January 1, 1982, and where appellant was not taxed under it for any period prior to its enactment. In re Champion Int'l Corp., 74 N.C. App. 639, 329

S.E.2d 691, cert. denied, 314 N.C. 540, 335 S.E.2d 15 (1985).

Midyear tax rate increase implemented by 2001 N.C. Sess. Laws 424, as codified in G.S. 105-134.2(a), was not levied until the conclusion of the taxable year; thus, the tax operated prospectively from the date of enactment and did not violate N.C. Const. Art. I, § 16. Coley v. State, 360 N.C. 493, 631 S.E.2d 121, 2006 N.C. LEXIS 594 (2006).

**Validation of proceedings for improvement of streets and sidewalks** which were begun and which have been concluded without an initial petition is proper and such act cannot be successfully attacked because it is retroactive or retrospective. Holton v. Town of Mocksville, 189 N.C. 144, 126 S.E. 326 (1925); Unemployment Comp. Comm'n v. Wachovia Bank & Trust Co., 215 N.C. 491, 2 S.E.2d 592 (1939).

**As to prosecution for wilful failure to support illegitimate child** born after the passage of the statute although the child was begotten before the effective date of the statute, see State v. Mansfield, 207 N.C. 233, 176 S.E. 761 (1934).

**Use of Adjudication of Juvenile Delinquency Permitted.** — Defendant's contention that use of an adjudication of juvenile delinquency as an aggravating factor in sentencing an adult defendant violates the ex post facto provisions of our state and federal constitutions was unfounded. State v. Taylor, 128 N.C. App. 394, 496 S.E.2d 811, 1998 N.C. App. LEXIS 26 (1998), cert. denied, appeal dismissed, 348 N.C. 76, 505 S.E.2d 884 (1998), aff'd, 349 N.C. 219, 504 S.E.2d 785 (1998).

Allowing the State to submit defendant's adjudication of delinquency as an aggravating circumstance at sentencing in his capital murder trial did not violate the prohibition against ex post facto laws; the enhanced sentence was not to be viewed as either a new jeopardy or additional penalty for the earlier crime since it was a stiffened penalty for the latest crime, which was considered to be an aggravated offense because a repetitive one. State v. Wiley, 355 N.C. 592, 565 S.E.2d 22, 2002 N.C. LEXIS 552 (2002).

**Conviction of Murder While Committing Felonious Child Abuse with the Use of a Deadly Weapon, Hands.** — The court rejected the defendant's ex post facto objections and upheld the defendant's conviction, under G.S. 14-17, of murder while committing felonious child abuse, in violation of G.S. 14-318.4, with the use of a deadly weapon, her hands, although this theory had not, at the time of the victim's death, been used to support a first degree murder conviction resulting from the use of the hands as deadly weapons. State v. Krider, 138 N.C. App. 37, 530 S.E.2d 569, 2000 N.C. App. LEXIS 541 (2000).

**Violent Habitual Felony Offender Statute.** — G.S. 14-7.7 was not an ex post facto law; defendant's violent habitual felon status would only enhance his punishment for the second degree murder conviction in the instant case, and not his punishment for the underlying voluntary manslaughter felony, and although the violent habitual felon statute was not enacted until 1994, perpetrators were on notice between 1967 and 1994, pursuant to a habitual felon statute, that certain crimes could be used to enhance punishment for later crimes. State v. Wolfe, 157 N.C. App. 22, 577 S.E.2d 655, 2003 N.C. App. LEXIS 373 (2003), appeal dismissed, review denied, 357 N.C. 255, 583 S.E.2d 289 (2003), appeal dismissed, review denied, 357 N.C. 255, 583 S.E.2d 289 (2003), State v. Wolfe, 157 N.C. App. 22, 577 S.E.2d 655, 2003 N.C. App. LEXIS 373 (2003), appeal dismissed, review denied, 357 N.C. 255, 583 S.E.2d 289 (2003).

**Aggravated Sentence for Second Degree Murder.** — Defendant's aggravated sentence for second degree murder did not violated the ex post facto clauses in N.C. Const., Art. 1, § 16 and U.S. Const., Art. 1, § 10 because the trial court had the authority to use a special verdict for the jury to determine aggravating factors at the time of defendant's trial. State v. Borges, 183 N.C. App. 240, 644 S.E.2d 250, 2007 N.C. App. LEXIS 1037 (2007).

**Sex Offender Registration not Ex Post Facto Law.** — G.S. 14-208.11 is not an impermissible ex post facto law. State v. White, 162 N.C. App. 183, 590 S.E.2d 448, 2004 N.C. App. LEXIS 111 (2004).

**Town Ordinance Did Not Violate Ex Post Facto Clause.** — Woodfin, N.C., Ordinances § 130.03, which prohibited registered sex offenders from knowingly entering any public park owned and operated by a town, did not violate the Ex Post Facto Clause since: (1) the town meeting minutes revealed a non-punitive intention to maintain the parks for the enjoyment and safety of the people of the town; (2) a sex offender's claim that the ordinance banished the offender from public spaces was rejected; (3) the ordinance was not deemed punitive merely because it was not narrowly tailored since restrictions on a person's activities could be imposed without being punitive; and (4) the ordinance did not subject registered sex offenders to affirmative disability or restraint since they could still travel freely and attend to their daily functions. Standley v. Town of Woodfin, 186 N.C. App. 134, 650 S.E.2d 618, 2007 N.C. App. LEXIS 2121 (2007).

**Amendments to Statutes Criminalizing Possession of Guns by Ex-Felons.** — Application of G.S. 14-415.1 to convict defendant, who was convicted of a felony in 1983 and had fully served his sentence on that conviction when he was found in possession of a handgun in 2001, did not violate ex post facto where the statute was amended in 1995 and applied to all occurrences after that date; ex post facto was also not violated since defendant's 1983 conviction, which was the predicate felony for his conviction under G.S. 14-415.1, was a felony in 1983, was a felony in 1995 when the statute was amended, and was a felony in 2001 when defendant was found in possession of a handgun; finally, the amendment to G.S. 14-415.1 in 1995 did not increase the punishment for defendant's prior 1983 felony, but created a new offense, so ex post facto was also not violated on that ground. State v. Johnson, 169 N.C. App. 301, 610 S.E.2d 739, 2005 N.C. App. LEXIS 612 (2005).

Application of G.S./A 14-415.1, as amended in 2004, to a felon convicted more than 20 years before the amendment did not amount to an unconstitutional bill of attainder, as nothing indicated that the statute was enacted as a form of retroactive punishment, nor did the statute fall within the historical meaning of punishment; furthermore, plaintiff's status was not punishment imposed without judicial process. Britt v. State, 185 N.C. App. 610, 649 S.E.2d 402, 2007 N.C. App. LEXIS 1938 (2007).

Application of G.S. 14-415.1, as amended in 2004, to a felon who had been convicted more than 20 years before the amendment to G.S. 14-415.1, did not violate the ex post facto clause of the North Carolina Constitution because it was a non-punitive, regulatory scheme. Britt v. State, 185 N.C. App. 610, 649 S.E.2d 402, 2007 N.C. App. LEXIS 1938 (2007).

**Amendments to Statutes Criminalizing Possession of Guns by Ex-Felons Are Not Bills of Attainder.** — Application of G.S. 14-415.1 to convict defendant, who was convicted of a felony in 1983 and had fully served his sentence on that conviction when he was found in possession of a handgun in 2001, did not violate prohibitions against bills of attainder, or against bills of pain and penalties, since the statute's prohibition of possession of handguns by convicted felons outside their homes or businesses was not enacted as a retroactive punishment, was not historically regarded as punishment, and was not imposed without judicial process; defendant had a trial before being convicted under the statute; defendant was not punished for belonging to a designated class of people, but was convicted for violating a statute that was validly imposed on the group to which he belonged, so there was no violation of the bill of attainder provisions in U.S. Const., Art. I, § 10 and N.C. Const., Art. I, § 16. State v. Johnson, 169 N.C. App. 301, 610 S.E.2d 739, 2005 N.C. App. LEXIS 612 (2005).

**Applied** in In re Stedman, 305 N.C. 92, 286 S.E.2d 527 (1982); Smith v. American & Efird Mills, 305 N.C. 507, 290 S.E.2d 634 (1982); Harter v. Vernon, 139 N.C. App. 85, 532 S.E.2d 836, 2000 N.C. App. LEXIS 815 (2000).

**Cited** in State v. Kirkman, 293 N.C. 447, 238 S.E.2d 456 (1977).

## Sec. 17. Slavery and involuntary servitude.

Slavery is forever prohibited. Involuntary servitude, except as a punishment for crime whereof the parties have been adjudged guilty, is forever prohibited.

**History.** — The provisions of this section are similar to those of Art. I, § 33, Const. 1868.

### CASE NOTES

**Cited** in State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972); State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972); State v. Underwood, 283 N.C. 154, 195 S.E.2d 489 (1973); Williams v. Town of Grifton, 19 N.C. App. 462, 199 S.E.2d 288 (1973); Crowell v. Chapman, 306 N.C. 540, 293 S.E.2d 767 (1982); State v. Sinnott, 163 N.C. App. 268, 593 S.E.2d 439, 2004 N.C. App. LEXIS 370 (2004).

## Sec. 18. Courts shall be open.

All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

**History.** — The provisions of this section are similar to those of Art. I, § 35, Const. 1868.

**Legal Periodicals.** — For comment on unborn child being a person within the meaning of this section, see 28 N.C.L. Rev. 245 (1950).

For note on criminal defendants' rights during sentencing, see 50 N.C.L. Rev. 925 (1977).

For survey of 1981 constitutional law, see 60

N.C.L. Rev. 1272 (1982).

For note, "Wilder v. Amatex Corp.: A First Step Toward Ameliorating the Effect of Statutes of Repose on Plaintiffs with Delayed Manifestation Diseases," see 64 N.C.L. Rev. 416 (1986).

For note on the six year statutory bar to products liability actions, in light of Tetterton v. Long Manufacturing Co., 314 N.C. 44, 332 S.E.2d 67 (1985), see 64 N.C.L. Rev. 1157 (1986).

For article, "The American Medical Association vs. The American Tort System," see 8 Campbell L. Rev. 241 (1986).

For comment on tort reform, see 10 Campbell L. Rev. 439 (1988).

For article, "North Carolina Employment Law After Coman: Reaffirming Basic Rights in the Workplace," see 24 Wake Forest L. Rev. 905 (1989).

For note, "The North Carolina Supreme Court Engages in Stealthy Judicial Legislation: Doe v. Holt," see 71 N.C.L. Rev. 1227 (1993).

For note, "Rule 9(j) — Is Requiring a Plaintiff in a Medical Malpractice Action to Certify His or Her Claim Before Filing Unconstitutional ? — The Issue in Anderson v. Assimos," 25 Campbell L. Rev. 219 (2003).

For note, "The Constitutional Floor Doctrine and the Right to a Speedy Trial," see 26 Campbell L. Rev. 101 (2004).

For article, "The Rising Tide of North Carolina Constitutional Protection in the New Millenium," see 27 Campbell L. Rev. 223 (2005).

## CASE NOTES

I. General Consideration.
II. Access to the Courts.
III. Public Trials.
IV. Delay, Generally.
V. Speedy Criminal Trials.

### I. GENERAL CONSIDERATION.

***Editor's Note.*** *— Some of the cases cited below were decided under former Art. I, § 35, Const. 1868.*

**Notice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law** which are guaranteed by U.S. Const., Amend. XIV and this section. State v. Cox, 90 N.C. App. 742, 370 S.E.2d 260 (1988).

**Presumption That Proceedings Be Open.** — The framers' use of the imperative word "shall" places constitutional limits on a court's discretion in exercising control of its proceedings and creates a strong presumption that court proceedings be open to the litigants and the public; however, there are some circumstances when a court may close proceedings and seal court records. Virmani v. Presbyterian Health Servs. Corp., 127 N.C. App. 629, 493 S.E.2d 310 (1997), aff'd in part and rev'd in part on other grounds, 350 N.C. 449, 515 S.E.2d 675 (1999).

**Punitive Damages Cap.** — G.S. 1D-25, which places a cap on punitive damages, is not unconstitutional under the open courts provision, because it does not limit the recovery of actual damages. Rhyne v. K-Mart Corp., 149 N.C. App. 672, 562 S.E.2d 82, 2002 N.C. App. LEXIS 316 (2002), aff'd, 358 N.C. 160, 594 S.E.2d 1 (2004).

Because the Open Courts Clause of N.C. Const., Art. I, § 18 does not prevent the General Assembly from abolishing the recovery of punitive damages altogether, it follows that G.S. 1D-25, which limits the awards of punitive damages, does not violate the Open Courts Clause. Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004).

**Waiver of Rights.** — While every reasonable presumption will be indulged against a waiver of fundamental constitutional rights by a defendant in a criminal prosecution, a defendant may waive the benefit of constitutional guarantees by express consent, by failure to assert them in apt time, or by conduct inconsistent with a purpose to insist upon them. State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

**There is no constitutional impediment to arbitration agreements.** Miller v. Two State Constr. Co., 118 N.C. App. 412, 455 S.E.2d 678 (1995).

**Waiver by Arbitration.** — An agreement to arbitrate a dispute is not an unenforceable contract requiring waiver of a jury; thus, the trial court erred in concluding that because arbitration provision did not provide for trial of facts by a jury that it was unconscionable and unenforceable under G.S. 22B-10, and in violation of N.C. Const., Art. I, § 18 and 25. Miller v. Two State Constr. Co., 118 N.C. App. 412, 455 S.E.2d 678 (1995).

**Indictment, Arraignment and Trial on Same Day.** — Defendant's indictment, arraignment, and trial on the same day on a burglary charge was not such a flagrant violation of his due process rights that the court was required to dismiss the burglary indictment, since defendant, by not contesting indictments for armed robbery, larceny, and rape, conceded that he had been given sufficient time in which to prepare a defense on such charges; the burglary indictment arose out of the same series of events which led to the three other indictments; the offenses took place at such close proximity in time that any defense which counsel might have prepared to the charge of burglary could not have significantly differed from the defenses he prepared to the charges of larceny, armed robbery, and rape; and any proof of the nonexistence of the essential elements of burglary would necessarily be included in defendant's defense on the other charges in this case, because for each charge defendant would seek to disprove the State's evidence of the sequence of events leading up to the charge, which facts also supported the burglary indictment. State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (1980).

**Foreclosure of Mortgages.** — This section is not violated by G.S. 45-21.34 and 45-21.35, regulating the sale of real property upon the foreclosure of mortgages or deeds of trust. Woltz v. Asheville Safe Deposit Co., 206 N.C. 239, 173 S.E. 587 (1934).

G.S. 45-21.36 is constitutional and valid, since it recognizes the obligation of the debtor to pay his debt and the right of the creditor to enforce payment by action in accordance with the terms of the agreement, but provides merely for judicial supervision of sales under power to the end that the price bid at the sale shall not be conclusive as to the value of the property, and that the creditor may not recover any deficiency after applying the purchase price to the notes without first accounting for the fair value of the property in accordance with well-settled principles of equity. Richmond Mtg. & Loan Corp. v. Wachovia Bank & Trust Co., 210 N.C. 29, 185 S.E. 482 (1936), aff'd, 300 U.S. 124, 57 S. Ct. 338, 81 L. Ed. 552 (1937).

**The establishment of a cartway** involves the taking of private property by eminent domain, and land therefor may not be taken without giving the owner notice and an opportunity to be heard, with right of appeal according to the due course of the law. Waldroup v. Ferguson, 213 N.C. 198, 195 S.E. 615 (1938).

**The rights of the appellee would be protected** when the appellant failed to print the record as required, and his motion to reinstate the case, after dismissal, came too late. Cowan v. Layburn, 116 N.C. 526, 21 S.E. 175 (1895).

**Offenses Against Judicial System.** — A person who commits an act of embracery is liable in civil damages to one who is damaged thereby. Employers Ins. v. Hall, 49 N.C. App. 179, 270 S.E.2d 617 (1980), cert. denied, 301 N.C. 720, 276 S.E.2d 283 (1981).

**Not Applicable to Undergraduate Court.** — Undergraduate Court's powers are not derivative of the North Carolina judiciary system nor are they limited by the safeguards protecting a citizen in the state court system; thus, the undergraduate court could not be categorized as a "court" and the proceedings are not required to be open to the public. DTH Publishing Corp. v. University of N.C., 128 N.C. App. 534, 496 S.E.2d 8 (1998), cert. denied, 348 N.C. 496, 510 S.E.2d 382 (1998).

**Use of Closed Circuit Television Held Adequate to Allow Defendant to Confront Child Victim.** — Where, in prosecution for taking indecent liberties with a four-year-old child, during voir dire hearing as to victim's competency as a witness, defendant, although absent from the courtroom, was able to hear all testimony, interact freely with his attorney, and through his attorney confront the victim, thereby accomplishing effective cross-examination, the exclusion of defendant did not violate N.C. Const., Art. I, § 18, 19 or 23, as the trial court's use of a closed circuit television and its act of providing defendant and his attorney adequate opportunity to communicate during the victim's testimony were sufficient to permit defendant to hear the evidence and to refute it. State v. Jones, 89 N.C. App. 584, 367 S.E.2d 139 (1988).

**Prosecutor's Conflict of Interest.** — A prosecutor may not be disqualified from prosecuting a criminal action in this State unless and until the trial court determines that an actual conflict of interests exists. In this context, an "actual conflict of interests" is demonstrated where a district attorney or a member of his or her staff has previously represented the defendant with regard to the charges to be prosecuted and, as a result of that former attorney-client relationship, the prosecution has obtained confidential information which may be used to the defendant's detriment at trial. Any order of disqualification ordinarily should be directed only to individual prosecutors who have been exposed to such information. State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991).

**District Attorney's Abuse of Calendaring Authority Unconstitutional.** — Where the district attorney placed a large number of cases on the printed trial calendar knowing that all of the cases would not be called, thereby providing defendants virtually no notice of which cases were actually going to be called for trial, a tactic often employed by the district attorney in an attempt to surprise criminal defense counsel, the allegations were sufficient to state a claim that the statutes which grant the district attorney calendaring authority were being applied in an unconstitutional manner in the Fourteenth Prosecutorial District. Simeon v. Hardin, 339 N.C. 358, 451 S.E.2d 858 (1994).

**Jury Conversations.** — Where the record established that the substance of a conversation between a juror and the court related to the juror's having "overheard something about the case," where the court excused the juror, and to insure that "no one should be suspicious" about his ability to be fair and impartial, this juror was removed from the case prior to deliberations, and where no other juror indicated that he or she had overheard anything about the case, the conversation between the court and the juror could not have influenced the verdict. State v. Harrington, 335 N.C. 105, 436 S.E.2d 235 (1993).

**Jury Instruction.** — Pattern jury instruction used by trial court was internally consistent and meaningful, and did not misuse the term "extenuating," nor define the term "mitigating circumstance" in such a way as to confuse jurors or violate the defendant's due process and fundamental fairness rights. State v. Peterson, 350 N.C. 518, 516 S.E.2d 131, 1999 N.C. App. LEXIS 419 (1999), cert. denied, 528 U.S. 1164, 120 S. Ct. 1181, 145 L. Ed. 2d 1087 (2000).

**Applied** in In re Edens, 290 N.C. 299, 226 S.E.2d 5 (1976); Petrou v. Hale, 43 N.C. App. 655, 260 S.E.2d 130 (1979); Dixon v. Peters, 63 N.C. App. 592, 306 S.E.2d 477 (1983); Pangburn v. Saad, 73 N.C. App. 336, 326 S.E.2d 365 (1985); Teleflex Info. Sys. v. Arnold, 132 N.C. App. 689, 513 S.E.2d 85 (1999); Neill Grading & Constr. Co. v. Lingafelt, 168 N.C. App. 36, 606 S.E.2d 734, 2005 N.C. App. LEXIS 160 (2005).

**Cited** in State v. Rouse, — N.C. App. —, 679 S.E.2d 520, 2009 N.C. App. LEXIS 1162 (July 21, 2009);

McLean v. Sale, 38 N.C. App. 520, 248 S.E.2d 372 (1978); State v. Seay, 44 N.C. App. 301, 260 S.E.2d 786 (1979); Motor Inn Mgt., Inc. v. Irvin-Fuller Dev. Co., 46 N.C. App. 707, 266 S.E.2d 368 (1980); Strong v. Johnson, 53 N.C. App. 54, 280 S.E.2d 37 (1981); Walker v. Santos, 70 N.C. App. 623, 320 S.E.2d 407 (1984); DeSoto Trail, Inc. v. Covington Diesel, Inc., 77 N.C. App. 637, 335 S.E.2d 794 (1985); Gardner v. Asbestos Corp., 634 F. Supp. 609 (W.D.N.C. 1986); Atlantic Ins. & Realty Co. v. Davidson, 320 N.C. 159, 357 S.E.2d 668 (1987); State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988); Coman v. Thomas Mfg. Co., 325 N.C. 172, 381 S.E.2d 445 (1989); State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989); State v. Porter, 326 N.C. 489, 391 S.E.2d 144 (1990); Ragan v. County of Alamance, 98 N.C. App. 636, 391 S.E.2d 825 (1990); Harrison v. Edison Bros. Apparel Stores, 924 F.2d 530 (4th Cir. 1991); In re Alamance County Ct. Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991); State v. McIntosh, 336 N.C. 517, 444 S.E.2d 438 (1994); Babb v. Harnett County Bd. of Educ., 118 N.C. App. 291, 454 S.E.2d 833 (1995); Glen ex rel. Glen v. Charlotte-Mecklenburg Sch. Bd. of Educ., 903 F. Supp. 918 (W.D.N.C. 1995); State v. Chapman, 342 N.C. 330, 464 S.E.2d 661 (1995); State v. Rich, 346 N.C. 50, 484 S.E.2d 394 (1997); Lake James Community Volunteer Fire Dep't, Inc. v. Burke County, 149 F.3d 277 (4th Cir. 1998); State v. Bonnett, 348 N.C. 417, 502 S.E.2d 563 (1998); State v. McNeil, 350 N.C. 657, 518 S.E.2d 486, 1999 N.C. LEXIS 880 (1999); State v. Cheek, 351 N.C. 48, 520 S.E.2d 545, 1999 N.C. App. LEXIS 1158 (1999); Clark v. Visiting Health Prof'ls, Inc., 136 N.C. App. 505, 524 S.E.2d 605, 2000 N.C. App. LEXIS 63 (2000); In re Allison, 143 N.C. App. 586, 547 S.E.2d 169, 2001 N.C. App. LEXIS 329 (2001); Best v. Wayne Mem. Hosp., 147 N.C. App. 628, 556 S.E.2d 629, 2001 N.C. App. LEXIS 1259 (2001); State v. Wiley, 355 N.C. 592, 565 S.E.2d 22, 2002 N.C. LEXIS 552 (2002); State v. Price, — N.C. App. —, 611 S.E.2d 891 (2005); Houston v. Town of Chapel Hill, 177 N.C. App. 739, 630 S.E.2d 249, 2006 N.C. App. LEXIS 1199 (2006).

## II. ACCESS TO THE COURTS.

**This section guarantees access to the courts for redress of injuries.** Bolick v. American Barmag Corp., 54 N.C. App. 589, 284 S.E.2d 188 (1981), aff'd, 306 N.C. 364, 293 S.E.2d 415 (1982).

This section guarantees to those who suffer injury to their persons, property or reputation, the right to seek redress therefor in the courts of this State; any law which attempts to deny that right runs afoul of this guarantee. Bolick v. American Barmag Corp., 54 N.C. App. 589, 284 S.E.2d 188 (1981), aff'd, 306 N.C. 364, 293 S.E.2d 415 (1982).

**As to the scope and effect of this section,** see also Pentuff v. Park, 194 N.C. 146, 138 S.E. 616, 53 A.L.R. 626 (1927).

**No Denial of Access Where Plaintiff Chooses Federal Forum First.** — Open Courts clause in N.C. Const., Art. I, § 18, was not violated by the dismissal of the pharmacist's claim under the Persons with Disabilities Protection Act because the pharmacist was not denied access to nor barred from the state courts, but elected to commence federal administrative proceedings, thereby voluntarily surrendering the right to a remedy in state court. Bowling v. Margaret R. Pardee Mem'l Hosp., — N.C. App. —, 635 S.E.2d 624, 2006 N.C. App. LEXIS 2115 (2006), appeal dismissed, cert. denied, 361 N.C. 425, 648 S.E.2d 206 (2007).

**Remedy Must Be Legally Cognizable.** — The "remedy" constitutionally guaranteed "for an injury done" is qualified by the words "by due course of law." This means that the remedy constitutionally guaranteed must be one that is legally cognizable. The legislature has the power to define the circumstances under which a remedy is legally cognizable and those under which it is not. Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983).

**Common-Law Claims.** — This section guarantees access to the courts to those who have claims, but it does not in all cases forbid the General Assembly from defining or abolishing claims which arise under the common law. Lamb v. Wedgewood S. Corp., 55 N.C. App. 686, 286 S.E.2d 876 (1982), judgment modified on other grounds, 308 N.C. 419, 302 S.E.2d 868 (1983).

**Relation to Declaratory Judgment Actions.** — Although the North Carolina Uniform Declaratory Judgment Act, G.S. 1-253 to 1-267, empowers a trial court to decline a request for declaratory relief under certain circumstances, G.S. 1-257 should not be applied to thwart a properly presented constitutional challenge; the North Carolina courts are obligated to protect fundamental rights when those rights are threatened, and to that end, every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law. Therefore, where it clearly appears either that property or fundamental human rights are denied in violation of constitutional guarantees, and where a statutory provision is specifically challenged by a person directly affected by it, declaratory relief as to the constitutional validity of that provision is appropriate; in other words, when the requested declaration satisfies the recognized criteria, the trial court has no discretion to decline the request. Augur v. Augur, 356 N.C. 582, 573 S.E.2d 125, 2002 N.C. LEXIS 1262 (2002).

**Hindrance of Others' Rights Not Justified.** — The salutary principle set forth in this section does not justify the use of the courts for the assertion of fanciful rights or complaints based upon imaginary wrongs to hinder or delay others in the enjoyment of rights founded upon the law and in accord with justice and fair dealing among men. Carson v. Fleming, 188 N.C. 600, 125 S.E. 259 (1924).

**Statutes of Limitations.** — G.S. 1-50 does not violate the "open courts" provision of the North Carolina Constitution. Tetterton v. Long Mfg. Co., 314 N.C. 44, 332 S.E.2d 67 (1985).

G.S. 1-50(5) (now G.S. 1-50(a)(5)) and 1-15(c) are not unconstitutional as being violative of the open courts provision of the North Carolina Constitution and the equal protection clauses of the State and federal Constitutions. Square D Co. v. C.J. Kern Contractors, 314 N.C. 423, 334 S.E.2d 63 (1985).

**G.S. 1-75.12 Does Not Deny Litigants Access to North Carolina Courts.** — G.S. 1-75.12, which gives the trial court the power to enter a stay pending final disposition of another similar action litigated in another court, does not deny litigants access to North Carolina courts in violation of this section, but merely postpones litigation here pending the resolution of the same matter in another sovereign court. Home Indem. Co. v. Hoechst-Celanese Corp., 99 N.C. App. 322, 393 S.E.2d 118 (1990).

Trial court's application of G.S. 1-75.12 did not violate the "open courts" provision contained in this section. Lawyers Mut. Liab. Ins. Co. v. Nexsen Pruet Jacobs & Pollard, 112 N.C. App. 353, 435 S.E.2d 571 (1993).

**Jurisdiction over Justiciable Matters of Civil Nature.** — Except for areas specifically placing jurisdiction elsewhere (such as claims under the Workers' Compensation Act), the trial courts of North Carolina have subject matter jurisdiction over all justiciable matters of a civil nature. Harris v. Pembaur, 84 N.C. App. 666, 353 S.E.2d 673 (1987).

**Contract dispute between the parties constituted a "justiciable matter"** that was "cognizable" in North Carolina trial courts; therefore, the trial judge's determination that there was no subject matter jurisdiction was in error. Harris v. Pembaur, 84 N.C. App. 666, 353 S.E.2d 673 (1987).

**Sealing of Peer Review Materials.** — The qualified constitutional right on the part of the public to attend civil court proceedings did not preclude the trial court, under the facts presented, from giving effect to the protections of G.S. 131E-95 by sealing peer review materials and closing court proceedings concerning those materials. Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 515 S.E.2d 675, 1999 N.C. App. LEXIS 432 (1999), cert. denied, 529 U.S. 1033, 120 S. Ct. 1452, 146 L. Ed. 2d 337 (2000).

**In Forma Pauperis Proceedings.** — N.C. Const., Art. I, § 18 provides for open courts and G.S. 1-110 furthers the right by allowing access "to sue" in North Carolina's courts, notwithstanding a party's inability to advance court costs; however, the legislature's use of the words "to sue" and "advance" in G.S. 1-110 clearly indicate its intent that a motion to proceed in forma pauperis should be filed in "advance" of filing suit. Griffis v. Lazarovich, 164 N.C. App. 329, 595 S.E.2d 797, 2004 N.C. App. LEXIS 821 (2004).

**Standing.** — Allegations and evidence presented by the neighbors in regards to the increased traffic, increased water runoff, parking, and safety concerns, as well as the secondary adverse effects on the neighbors' businesses, were sufficient special damages to give standing to the neighbors to challenge, pursuant to G.S. 160A-388(e2), the issuance of a special use permit for the opening of an adult establishment. Mangum v. Raleigh Bd. of Adjustment, 362 N.C. 640, 669 S.E.2d 279, 2008 N.C. LEXIS 983 (2008).

**Standing to Challenge Transfers from Highway Trust Fund.** — Taxpayers had standing to challenge unlawful or unconstitutional government expenditures and were entitled to seek a declaratory judgment; a trial court erred in dismissing taxpayers' suit, on behalf of themselves and others similarly situated, which challenged money transfers from the North Carolina Highway Trust Fund to the general fund. Goldston v. State, 361 N.C. 26, 637 S.E.2d 876, 2006 N.C. LEXIS 1300 (2006).

**Standing to Bring Antitrust and Consumer Fraud Action.** — Trial court erred in dismissing a consumer's action against manufacturers under N.C. G.S. 75-1 and G.S. 75-1.1 pursuant to G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) for lack of standing because the consumer had standing to bring the antitrust and consumer fraud action; if the consumer could demonstrate that the increased ethylene propylene diene monomor elastomers prices affected the price of the goods he purchased, then he would have established the type of injury to indirect purchasers that the General Assembly intended to remedy by allowing indirect purchaser suits. Teague v. Bayer AG, — N.C. App. —, 671 S.E.2d 550, 2009 N.C. App. LEXIS 58 (2009).

### III. PUBLIC TRIALS.

**The public, and especially the parties, are entitled to see and hear what goes on** in the court. That the courts are open is one of the sources of their greatest strength. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

A criminal defendant also has the right to a public trial, a right guaranteed by this section and U.S. Const., Amends. VI and XIV. The public, and especially the parties are entitled to see and hear what goes on in the courts. State v. Callahan, 102 N.C. App. 344, 401 S.E.2d 793 (1991).

**In a court proceeding, all parties are entitled to be present** at all stages so that they may hear the evidence and have an opportunity to refute it if they can. Raper v. Berrier, 246 N.C. 193, 97 S.E.2d 782 (1957); Cook v. Cook, 5 N.C. App. 652, 169 S.E.2d 29 (1969).

**Judge's announcement of his ruling in open court could not reasonably be characterized as a hearing,** much less one at which defendant's presence was required, where judge simply took a final step in the process of deciding whether to release any part of defendant's prison records to the prosecution and announced his decision from the bench. State v. Rich, 346 N.C. 50, 484 S.E.2d 394 (1997), cert. denied, 522 U.S. 1002, 118 S. Ct. 573, 139 L. Ed. 2d 412 (1997).

**The trial and disposition of criminal cases is the public's business** and ought to be conducted in public in open court. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

**In every criminal prosecution it is the right of the accused to be present** throughout the trial, unless he waives the right. And in capital trials such rights cannot be waived by the prisoner. State v. Pope, 257 N.C. 326, 126 S.E.2d 126 (1963), commented on in 41 N.C.L. Rev. 260.

**Judge's Ex Parte Communications with Jury Before Verdict.** — Where, during the course of the trial, the presiding trial judge engaged in an ex parte communication with the jury, and prior to reconvening court, the judge entered the jury room where the jurors had gathered and was alone with the jurors, this conduct on the part of the presiding judge violated the defendant's rights under N.C. Const., Art. I, § 23 and this section, and U.S. Const., Amends. VI and XIV. State v. Callahan, 102 N.C. App. 344, 401 S.E.2d 793 (1991).

**The trial court's ex parte in camera hearing in which the trial court excluded both defendant and defense counsel** in order to consider a motion concerning the identity of the State's confidential informant was improper and violated his constitutional right to an open court and public trial where the trial court excluded defendant and his counsel from the hearing on defendant's motion without hearing evidence and finding facts as to the necessity for their exclusion and without affording him the right to offer evidence in support of his motion. State v. Moctezuma, 141 N.C. App. 90, 539 S.E.2d 52, 2000 N.C. App. LEXIS 1287 (2000).

**Clearing Courtroom During Testimony of Child Rape Victim.** — In a prosecution for first-degree rape of a child, the constitutional right of defendant to a public trial was not violated by the court's order, entered pursuant to G.S. 15-166, that during the testimony of the seven-year-old victim the courtroom would be cleared of all persons except defendant, defendant's family, defense counsel, defense witnesses, the prosecutor, the State's witnesses, officers of the court, members of the jury and members of the victim's family. State v. Burney, 302 N.C. 529, 276 S.E.2d 693 (1981).

**Questioning of Child in Custody Proceeding.** — Without doubt the court may question a child in open court in a custody proceeding, but it can do so privately only by consent of the parties. Cook v. Cook, 5 N.C. App. 652, 169 S.E.2d 29 (1969).

In a proceeding for the custody of a minor child, where the judge conferred with the minor in chambers in the absence of counsel and the parties, the judgment would be reversed and the cause sent back for rehearing upon objection duly entered by petitioner, the record failing to show consent or waiver of his constitutional right. Raper v. Berrier, 246 N.C. 193, 97 S.E.2d 782 (1957).

**Civil Commitment Proceedings.** — This section does not create a constitutional right on the part of the press and public to attend civil commitment proceedings. WSOC Television, Inc. v. State ex rel. Att'y Gen., 107 N.C. App. 448, 420 S.E.2d 682, cert. denied, 333 N.C. 168, 424 S.E.2d 905 (1992).

**Exclusion of Former Attorney Not Warranted.** — In a special proceeding initiated by plaintiffs for the partition of certain land held as a tenancy in common, plaintiffs' former attorney was not subject to being excluded from the courtroom merely because he filed a pleading adverse to plaintiffs' interest after they had terminated his services, especially in light of the fact that the record affirmatively disclosed that he did not represent anyone or take part in or affect the trial in any way. Ingram v. Craven, 68 N.C. App. 502, 315 S.E.2d 364 (1984).

**Judge's Warning to Restrict Public Egress Was Proper.** — Where trial judge informed those in the courtroom that he was concerned that the jury would be distracted by movement of spectators in and out of the room, and where he consequently warned them that if they wished to leave the courtroom, they should do so immediately, for they would not be allowed to do so after closing arguments began, barring an emergency, the order was not a denial of a public trial in violation of this section since the judge did not vacate the courtroom nor bar the courtroom door without due warning to those within and without, and since the judge was authorized under G.S. 15A-1034(a) to impose reasonable limitations on access to the courtroom. State v. Clark, 324 N.C. 146, 377 S.E.2d 54 (1989).

**Removal of Spectators From Courtroom Was Justified.** — Trial judge did not err in removing four spectators from the courtroom, where the evidence showed, inter alia, that the spectators were talking in the courtroom, in violation of the judge's pretrial order. State v. Dean, — N.C. App. —, 674 S.E.2d 453, 2009 N.C. App. LEXIS 456 (2009).

## IV. DELAY, GENERALLY.

**The creation of inferior courts by the legislature has been useful** in the administration of justice without "delay" in accordance with this section. Albertson v. Albertson, 207 N.C. 547, 178 S.E. 352 (1935).

**A motion for a continuance is addressed to the discretion of the trial judge** to be determined by him upon the facts in the exercise of his duty to administer right and justice without sale, denial, or delay. State v. Godwin, 216 N.C. 49, 3 S.E.2d 347 (1939).

**Delay Caused by Irregular Pleading.** — Under the provisions of this section an adversary party ought not to be delayed in the final adjudication of the controversy by the fact that the exceptions taken by the opposite party are so drawn as to take two chances, first of a favorable decision by the court, and then of a finding in his favor by the jury. Nor ought he to be delayed because the demand for a jury trial fails to point out the precise issue as to which testimony must be offered. Keystone Driller Co. v. Worth, 118 N.C. 746, 24 S.E. 517 (1896).

**Disregarding Attempted Appeal from Nonappealable Order.** — In order to promote the principle set forth in this section, courts may disregard an attempted appeal from a nonappealable interlocutory order and proceed with trial to avoid delay. Veazey v. City of Durham, 231 N.C. 357, 57 S.E.2d 377, reh'g denied, 232 N.C. 744, 59 S.E.2d 429 (1950).

**The denial of a motion for judgment on the pleadings is not immediately appealable,** since otherwise a litigant could delay the administration of justice in contravention of this section. Garrett v. Rose, 236 N.C. 299, 72 S.E.2d 843 (1952).

**Delay Not Wilful.** — There was no showing that the prosecution wilfully or through neglect or for improper purposes delayed defendant's trial where the delay was due largely to the operation of neutral factors and not to any malevolent intent on the part of the prosecution. State v. Webster, 337 N.C. 674, 447 S.E.2d 349 (1994).

**Delay Not Found.** — Plaintiff offered no evidence to support the claim that the dual role served by the Attorney General's Office both in representing defendant institution and being legal advisor to State Personnel Commission caused actual bias or unfair prejudice to plaintiff, nor that it created any delay in the disposition of her claims. Dorsey v. UNC-Wilmington, 122 N.C. App. 58, 468 S.E.2d 557 (1996).

## V. SPEEDY CRIMINAL TRIALS.

**Right to Speedy Trial.** — Every person formally accused of crime is guaranteed a speedy and impartial trial by this section and U.S. Const., Amend. VI and XIV. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Prisoners confined for unrelated crimes are entitled to the benefits of the constitutional guaranty of a speedy and impartial trial. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

**The constitutional guarantee of a speedy trial does not outlaw good faith delays** which are reasonably necessary for the State to prepare and present its case. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

**Time Period Involved in Right to Speedy Trial.** — The right to a speedy trial pertains to the time period between the date of the occurrence of the alleged crime and the date when a defendant is "accused" of committing that crime, and an individual becomes "accused" of a crime for the purpose of calculating the length of this delay when he is either arrested or indicted. State v. Salem, 50 N.C. App. 419, 274 S.E.2d 501, cert. denied, 302 N.C. 401, 279 S.E.2d 355 (1981).

**Unless some fixed time limit is prescribed by statute, speedy trial questions must be resolved on a case-by-case basis.** While all relevant circumstances must be considered, four interrelated factors are of primary significance: (1) the length of delay, (2) the reason for the delay, (3) the extent to which defendant has asserted his right and (4) the extent to which defendant has been prejudiced. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978); State v. Bare, 77 N.C. App. 516, 335 S.E.2d 748 (1985), cert. denied, 315 N.C. 392, 338 S.E.2d 881 (1986).

**Undue delay which is arbitrary and oppressive** or the result of deliberate prosecution efforts to hamper the defense violates the constitutional right to a speedy trial. State v. Bare, 77 N.C. App. 516, 335 S.E.2d 748 (1985), cert. denied, 315 N.C. 392, 338 S.E.2d 881 (1986).

**Defendant Causing Delay Not Denied Speedy Trial.** — A criminal defendant who has caused or acquiesced in a delay will not be permitted to use it as a vehicle in which to escape justice. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

**Right Must Be Asserted.** — Failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

**Defendant's failure to assert her speedy trial right sooner in the process did not foreclose her speedy trial claim,** but it did weigh somewhat against her contention that she had been unconstitutionally denied a speedy trial. State v. Webster, 337 N.C. 674, 447 S.E.2d 349 (1994).

**Burden on Defendant.** — The length of a delay is not determinative of whether a violation has occurred; the issue must be resolved on the facts of each case, and the defendant has the burden of establishing that the delay was purposeful or oppressive or by reasonable effort could have been avoided by the State. State v. Bare, 77 N.C. App. 516, 335 S.E.2d 748 (1985), cert. denied, 315 N.C. 392, 338 S.E.2d 881 (1986).

**Defendant's assertion of his speedy trial right is entitled to strong evidentiary weight** in determining whether he is being deprived of such right. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

**Defendant was not deprived of his constitutional right to a speedy trial** as guaranteed by this section, since delay of two and one-half years was not inordinate, State had a legitimate reason for its delay and defendant showed no prejudice resulting from the delay. State v. Avery, 95 N.C. App. 572, 383 S.E.2d 224 (1989), appeal dismissed and cert. denied, 326 N.C. 51, 389 S.E.2d 96 (1990).

Defendant was not denied his constitutional right to a speedy trial, where delay was not the result of prosecutorial willfulness or neglect, and where defendant did not assert his right to a speedy trial until three years after his arrest and failed to show that he was prejudiced by the delay. State v. Lundy, 135 N.C. App. 13, 519 S.E.2d 73 (1999).

Trial court properly denied defendant's motion to dismiss on the grounds that the State violated his constitutional right to a speedy trial where he failed to show that the delay of his second trial was due to the neglect or willfulness of the prosecution, where he failed to assert his right in the five-year interval, and where his claim that the delay resulted in his inability to locate key witnesses was undermined by his failure to call all his witnesses in the first trial. State v. Spinks, 136 N.C. App. 153, 523 S.E.2d 129, 1999 N.C. App. LEXIS 1298 (1999).

The defendant's right to a speedy trial was not violated, although the length of delay from indictment to trial, was 3 years and 326 days, where: the delay resulted not from willful misconduct but from the appointment of substitute defense counsel and changes in prosecutors; the State only refused to comply with discovery requests by defendant when these concerned evidence or information to which he was not statutorily entitled; and defendant's continual refusal to cooperate in the preparation of his defense resulted in the withdrawal of counsel nearly two years after the indictment. State v. Grooms, 353 N.C. 50, 540 S.E.2d 713, 2000 N.C. LEXIS 895 (2000), cert. denied, 534 U.S. 838, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001).

The defendant, whose trial was delayed approximately four and a half years, was not denied his constitutional right under this section where: the local docket was congested with capital cases; the prosecutor's decisions pertaining to scheduling and trial order were not based upon unconstitutional factors, rather the delay was due to neutral factors; the defendant's actions were not consistent with a desire for speedy trial; and although the investigator had died, the State presented other investigators who testified to the same events and observations sought by defendant, and gave the defendant the opportunity to impress upon the jury the absence of the detective best able to testify as to certain events and observations. State v. Hammonds, 141 N.C. App. 152, 541 S.E.2d 166, 2000 N.C. App. LEXIS 1309 (2000).

Defendant was not denied the right to a speedy trial on a rape conviction, as defendant's excessive post-accusation incarceration before trial was outweighed by defendant's inability to prove neglect or willfulness by the prosecutor combined with a lack of allegation or proof of prejudice. State v. Strickland, 153 N.C. App. 581, 570 S.E.2d 898, 2002 N.C. App. LEXIS 1266 (2002), cert. denied, 357 N.C. 65, — S.E.2d — (2003), cert. dismissed, — N.C. —, 602 S.E.2d 679 (2004).

Appellate court did not err in affirming the trial court's denial of defendant's motion to dismiss arguing his speedy trial right was violated as application of the four-factor Barker test did not show that the four-year delay between defendant's indictment for the killing of another man and his plea bargain to second-degree murder right before trial was the result of the State's inaction or unreasonableness; rather, the evidence showed that the trial court had a crowded docket regarding murder charges and that defendant was not prejudice by the delay, and thus, denial of the motion to dismiss was not error. State v. Spivey, 357 N.C. 114, 579 S.E.2d 251, 2003 N.C. LEXIS 422 (2003).

There was no error in denying defendant's motion to dismiss because defendant's constitutional right to a speedy trial was not violated even though almost two years passed between the date of the offenses and trial; defendant failed to demonstrate actual or substantial prejudice resulting from the delay as he alleged only anxiety and concern, and also failed to meet his burden of showing that the reason for the delay was the neglect or willfulness of the prosecution. State v. Doisey, 162 N.C. App. 447, 590 S.E.2d 886, 2004 N.C. App. LEXIS 188 (2004).

Trial court properly denied defendant's motion to dismiss for denial of a speedy trial, pursuant to his rights under U.S. Const., Amend. VI and N.C. Const., Art. I, § 18, as the 20-month delay was presumptively prejudicial and defendant had asserted his right to a speedy trial, but the reason was attributable to the trial court's case load, which was not due to neglect or willfulness by the State, and to the multiple continuances granted to defendant, and he failed to show that he was prejudiced thereby. State v. Dorton, 172 N.C. App. 759, 617 S.E.2d 97, 2005 N.C. App. LEXIS 1794 (2005), cert. denied, 360 N.C. 69, 623 S.E.2d 775 (2005).

Defendant's constitutional right to a speedy trial under N.C. Const., Art. I, § 18 and U.S. Const., Amend. VI was not violated because, although a delay of three years and seven months from arrest to trial was exceptionally long, defendant's right to a speedy trial was not impaired as defendant demonstrated no prejudice whatsoever from the delay and he was not incarcerated during the delay; indeed, he moved to another state during the delay. State v. McBride, 187 N.C. App. 496, 653 S.E.2d 218, 2007 N.C. App. LEXIS 2418 (2007).

**Defendant Denied Right to Speedy Trial.** — Where defendant's case did not occur until nearly three years from the date of arrest for trafficking in cocaine by transporting cocaine, and during that time the case was placed on the trial calendar thirty-one times, but never called by the district attorney, and essential witness was no longer available at time of trial, defendant suffered substantial prejudice, and was denied his right to a speedy trial. State v. Chaplin, 122 N.C. App. 659, 471 S.E.2d 653 (1996).

Defendant's right to a speedy trial under the Sixth Amendment and N.C. Const., Art. I, § 18 was violated where, inter alia, the record showed: (1) that much of the over four-year delay between defendant's arrest and defendant's trial was caused by the State's failure to submit evidence to the state bureau of investigation lab to be examined for over three years; (2) that the State's failure to request a comparison of the evidence to a person the State was notified might have been the guilty party; (3) defendant formally asserted defendant's right to a speedy trial more than a year and a half before the trial began; and (4) the delay in bringing defendant to trial prejudiced defendant, as, inter alia, defendant was incarcerated for 366 days prior to trial. State v. Washington, — N.C. App. —, 665 S.E.2d 799, 2008 N.C. App. LEXIS 1625 (2008).

**Balancing the four factors enunciated in Barker v. Wingo,** 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), defendant was not denied the right to a speedy trial and there was no reasonable probability that had counsel advanced a motion to dismiss based on denial of that right, the result of the proceeding would have been different. State v. Johnson, 124 N.C. App. 462, 478 S.E.2d 16 (1996).

**Where there was some prejudice to defendant caused by the delay in her trial, the weight of it in the balancing process was diminished** by the absence of any impairment to her defense against the criminal charge and the absence of substantial pretrial incarceration. State v. Webster, 337 N.C. 674, 447 S.E.2d 349 (1994).

**Foreign Custody and Absence of Prejudice as Factors in Denying Speedy Trial Violation.** — Defendant was not denied his right to a speedy trial by the delay between his indictment in November, 1977 and his trial in July, 1979, where he was either in federal custody or in custody in South Carolina except from February to September, 1978 and March to July, 1979, and the remaining time fell short of denying defendant his constitutional right to a speedy trial because there was no evidence that any of the delay for which this State was responsible prejudiced his case or his ability to present his defense. State v. Lynch, 300 N.C. 534, 268 S.E.2d 161 (1980).

## Sec. 19. Law of the land; equal protection of the laws.

No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life,

**liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.**

**Cross References.** — As to the rights of the defendant in a criminal prosecution, see N.C. Const., Art. I, § 23. For provision that no person shall be excluded from jury service on account of sex, race, color, religion or national origin, see N.C. Const., Art. I, § 26.

**History.** — The provisions of this section are similar to those of Art. I, § 17, Const. 1868.

**Legal Periodicals.** — For article on eminent domain in North Carolina, see 35 N.C.L. Rev. 296 (1957).

For note on right of confrontation at presentence investigation, see 41 N.C.L. Rev. 260 (1963).

For comment on the cul-de-sac doctrine, see 44 N.C.L. Rev. 850 (1966).

For case law survey as to eminent domain, see 44 N.C.L. Rev. 941, 1003 (1966).

For case law survey as to due process and double jeopardy, see 45 N.C.L. Rev. 881 (1967).

For case law survey as to right to notice and hearing, see 45 N.C.L. Rev. 883 (1967).

For case law survey as to property rights, see 45 N.C.L. Rev. 887 (1967).

For comment on the public purpose doctrine, see 3 Wake Forest Intra. L. Rev. 37 (1967).

For note on statutory requirement of safety helmets for motorcyclists, see 6 Wake Forest Intra. L. Rev. 349 (1970).

For article surveying recent decisions by the North Carolina Supreme Court in the area of criminal procedure, see 49 N.C.L. Rev. 262 (1971).

For note analyzing possible constitutional barriers to judicial abrogation of contractual governmental immunity, see 12 Wake Forest L. Rev. 1082 (1976).

For note on use of physical restraints on defendant during trial, see 13 Wake Forest L. Rev. 231 (1977).

For note on the use of state constitutional law to void occupational licensing statutes which unreasonably restrict freedom of occupational choice, see 13 Wake Forest L. Rev. 507 (1977).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For note on state regulation of public solicitation for religious purposes, see 16 Wake Forest L. Rev. 996 (1980).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1047 (1981).

For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

For survey of 1981 constitutional law, see 60 N.C.L. Rev. 1272 (1982).

For 1984 survey, "Double Jeopardy and Substantial Rights in North Carolina Appeals," see 63 N.C.L. Rev. 1061 (1985).

For note on the Declaratory Judgment Act and due process in expulsions from voluntary trade associations, in light of Harrison v. Gaston Bd. of Realtors, Inc., 311 N.C. 230, 316 S.E.2d 59 (1984), see 21 Wake Forest L. Rev. 121 (1985).

For note, "Wilder v. Amatex Corp.: A First Step Toward Ameliorating the Effect of Statutes of Repose on Plaintiffs with Delayed Manifestation Diseases," see 64 N.C.L. Rev. 416 (1986).

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

For note on the six year statutory bar to products liability actions, in light of Tetterton v. Long Manufacturing Co., 314 N.C. 44, 332 S.E.2d 67 (1985), see 64 N.C.L. Rev. 1157 (1986).

For note on the retroactive application of section 39-13.6 under a vested rights analysis, see 65 N.C.L. Rev. 1195 (1987).

For note discussing the evolution of the law governing double jeopardy and multiple punishments in a single prosecution context, particularly with regard to larceny and breaking and entering, in light of State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986), see 65 N.C.L. Rev. 1267 (1987).

For note, "Does Double Jeopardy Include a Double Standard?," see 66 N.C.L. Rev. 1191 (1988).

For article, "In Defense of Aston Park: The Case for State Substantive Due Process Review of Health Care Regulation," see 68 N.C.L. Rev. 253 (1990).

For article, "Ake Revisited: Expert Psychiatric Witnesses Remain Beyond Reach for the Indigent," see 68 N.C.L. Rev. 763 (1990).

For note, "United States v. Halper: Remedial Justice and Double Jeopardy," see 68 N.C.L. Rev. 979 (1990).

For essay, "Liberty, the 'Law of the Land,' and Abortion in North Carolina," see 71 N.C.L. Rev. 1839 (1993).

For a comment on the acquisition, abandonment, and preservation of rail corridors in North Carolina, see 75 N.C.L. Rev. 1989 (1997).

For a survey of 1996 developments in the law regarding prisoner rights, see 75 N.C.L. Rev. 2428 (1997).

For article discussing the rise and decline of North Carolina Abortion Fund, see 22 Campbell L. Rev. 119 (1999).

For note, "Rule 9(j) — Is Requiring a Plaintiff in a Medical Malpractice Action to Certify His or Her Claim Before Filing Unconstitutional ? — The Issue in Anderson v. Assimos," 25 Campbell L. Rev. 219 (2003).

For article, "The Rising Tide of North Carolina Constitutional Protection in the New Millenium," see 27 Campbell L. Rev. 223 (2005).

## CASE NOTES

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### I. GENERAL CONSIDERATION.

***Editor's Note.*** *— Some of the cases cited below were decided under former Art. I, § 17, Const. 1868.*

**"Liberty".** — The term "liberty," as used in this section, is as extensive as is the same term as used in U.S. Const., Amend. XIV. Bulova Watch Co. v. Brand Distrib. of N. Wilkesboro, Inc., 285 N.C. 467, 206 S.E.2d 141 (1974).

**Sovereign Immunity.** — Sovereign immunity was not available as a defense to the claims of temporary employees that were brought directly under the North Carolina Constitution against state agencies and employees. Sanders v. State Pers. Comm'n, 183 N.C. App. 15, 644 S.E.2d 10, 2007 N.C. App. LEXIS 845 (2007).

**Federal Decisions Do Not Control Interpretation by North Carolina Supreme Court.** — Decisions by the federal courts as to the construction and effect of the due process clause of the United States Constitution are binding on the North Carolina Supreme Court; however, such decisions, although persuasive, do not control an interpretation by the North Carolina Supreme Court of this section. The North Carolina Supreme Court will therefore make an independent determination of the constitutional rights of the plaintiffs under this section. McNeill v. Harnett County, 327 N.C. 552, 398 S.E.2d 475 (1990).

Claims asserted in the State Court on the basis of the North Carolina Constitution were not identical to the claims asserted by the plaintiff in the Federal Court on the basis of freedom of speech and press under the United States Constitution and dismissal of the state claims on the basis of res judicata was error. Evans v. Cowan, 122 N.C. App. 181, 468 S.E.2d 575 (1996), cert. denied, 343 N.C. 510, 471 S.E.2d 634, aff'd, 345 N.C. 177, 477 S.E.2d 926 (1996).

**Other State Remedies Must Be Exhausted.** — A state constitutional action is not proper under this section, unless no other state remedy is available; here, an existing state tort remedy precluded plaintiff's assault-based constitutional claim against an arresting officer.

Glenn-Robinson v. Acker, 140 N.C. App. 606, 538 S.E.2d 601, 2000 N.C. App. LEXIS 1258 (2000).

Individual's constitutional claims against the sheriff, the sheriff's department, the county, and the detective, based upon the stopping, searching, and detaining of the individual and the retention of his property, were dismissed because the existing common law remedies of false imprisonment, trespass to chattels, and negligence were appropriate alternatives under the facts alleged in the complaint and waiver of governmental immunity was not pleaded. Seaton v. Owens, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 22298 (M.D.N.C. Dec. 8, 2003).

Former employee did not adequately allege a free speech claim, an equal protection claim, and an exclusive emoluments claim when she had an adequate state remedy for those violations because the employee's claim under the Whistleblower Act, G.S. 126-86, was an adequate state law remedy for her alleged free speech violation, her claim of misappropriation of state funds was expressly covered by the Act, G.S. 126-84, and thus was an adequate state law remedy for her exclusive emoluments clause claim; because the employee's equal protection claim alleged discrimination based on activities protected by the Whistleblower Act, it was also precluded. Helm v. Appalachian State Univ., — N.C. App. —, 670 S.E.2d 571, 2008 N.C. App. LEXIS 2251 (2008).

**Due Process Rights Satisfied By Case Hearing Before the North Carolina Office of Administrative Hearings.** — Where a demoted state employee failed to show that there were actually any similarly situated persons who were treated differently and he did not argue that any difference in discipline was based on a protected characteristic or was without rational basis, his due process and equal protection arguments failed; the employee's due process rights were satisfied by the opportunity to pursue a contested case hearing before the North Carolina Office of Administrative Hearings. Hilliard v. N.C. Dep't of Corr., 173 N.C. App. 594, 620 S.E.2d 14, 2005 N.C. App. LEXIS 2121 (2005).

**N.C. Const., Art. I, § 14 and this section do not require that a statewide standard be judicially incorporated into G.S. 14-190.1** in order to render the statute facially valid. State v. Mayes, 323 N.C. 159, 371 S.E.2d 476 (1988), cert. denied, 488 U.S. 1009, 109 S. Ct. 792, 102 L. Ed. 2d 784 (1989).

**There is a presumption of honesty and integrity in those serving as adjudicators** and a petitioner must demonstrate a risk of bias or prejudgment. In re Stuart, 59 N.C. App. 715, 297 S.E.2d 621 (1982).

**When Legislature May Grant Special Exemption from Duty Imposed on Citizens Generally.** — The limitation of N.C. Const., Art. I, § 32, like that of this section, does not apply to an exemption from a duty imposed upon citizens generally if the purpose of the exemption is the promotion of the general welfare, as distinguished from the benefit of the individual, and if there is reasonable basis for the legislature to conclude that the granting of the exemption would be in the public interest. State v. Knight, 269 N.C. 100, 152 S.E.2d 179 (1967).

**State Action Required.** — Tobacco warehouses were not able to assert constitutional claims of deprivation of property rights and prohibition against monopolies against a tobacco cooperative stabilization corporation because the corporation was not a State actor. Bailey v. Flue-Cured Tobacco Coop. Stabilization Corp., 158 N.C. App. 449, 581 S.E.2d 811, 2003 N.C. App. LEXIS 1179 (2003).

**Contempt Proceedings.** — A person denying his asserted violation of a restraining order in contempt proceedings has the right, under the provisions of this section, to confront and cross-examine the witnesses by whose testimony the asserted violation is to be established, but the right is waivable. Lowder v. All Star Mills, Inc., 45 N.C. App. 348, 263 S.E.2d 624 (1980), aff'd in part and rev'd in part, 301 N.C. 561, 273 S.E.2d 247 (1981).

**Injunction Against Expenditure of Public Funds for Corporation Not Created for Public Purpose.** — If an act creating a corporation is unconstitutional as violative of N.C. Const., Art. V, § 2 and this section and of U.S. Const., Amend. XIV, § 1 and is void because the purpose for which the corporation was created is not a public purpose, then a taxpayer may maintain an action to restrain state officials from paying to the corporation and the corporation from using money appropriated out of the general fund. Martin v. North Carolina Hous. Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

**Requirement That Taxpayer Reduce His Carryover Losses Not Violative of This Section.** — The requirement that the taxpayer reduce his North Carolina carryover losses by his non-North Carolina income did not result in a sophisticated scheme which belatedly taxed the non-North Carolina income and did not violate either the due process clause of the United States Constitution or the law of the land clause of this section. Aronov v. Secretary of Revenue, 323 N.C. 132, 371 S.E.2d 468, rehearing denied, 323 N.C. 480, 373 S.E.2d 860 (1988), cert. denied, 489 U.S. 1096, 109 S. Ct. 1568, 103 L. Ed. 2d 935 (1989).

**A governmental agency is not precluded from competing with its franchisee,** despite the fact that the value of the franchise is diminished or destroyed by such competition. Such competition does not result in a taking or injuring of the franchisee's property without due process of law. Stillings v. City of Winston-Salem, 311 N.C. 689, 319 S.E.2d 233 (1984).

**Where Employee Was Not Without an Adequate Legal Remedy, He Could Not State a Claim Under This Section.** — Where an employee was entitled to seek relief pursuant to § 301 of the Labor-Management Relations Act, 29 U.S.C.S. § 185, he was not without an adequate legal remedy and thus could not state a claim directly under N.C. Const., Art. I, § 19. Freeman v. Duke Power Co., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 14432 (M.D.N.C. Aug. 15, 2003).

**Doctrine of Collateral Estoppel Not Applicable.** — Doctrine of collateral estoppel did not preclude an aggressor instruction where no unanimous verdict was reached by the jury on the issue of whether defendant was or was not the agressor in defendant's first trial. State v. Herndon, 177 N.C. App. 353, 629 S.E.2d 170, 2006 N.C. App. LEXIS 961 (2006), review denied, appeal dismissed, 360 N.C. 539, 634 S.E.2d 542 (2006).

**Applied** in Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971); In re Hawkins, 17 N.C. App. 378, 194 S.E.2d 540 (1973); State v. Alderman, 25 N.C. App. 14, 212 S.E.2d 205 (1975); State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975); State v. Putman, 28 N.C. App. 70, 220 S.E.2d 176 (1975); State v. Robinson, 290 N.C. 56, 224 S.E.2d 174 (1976); Nantz v. Employment Sec. Comm'n, 290 N.C. 473, 226 S.E.2d 340 (1976); State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976); Poole v. Hanover Brook, Inc., 34 N.C. App. 550, 239 S.E.2d 479 (1977); Duggins v. North Carolina State Bd. of CPA Exmrs., 294 N.C. 120, 240 S.E.2d 406 (1978); State v. Gunther, 38 N.C. App. 279, 248 S.E.2d 97 (1978); State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978); Heritage Village Church & Missionary Fellowship, Inc. v. State, 40 N.C. App. 429, 253 S.E.2d 473 (1979); North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979); In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979); American Mfrs. Mut. Ins. Co. v. Ingram, 43 N.C. App. 621, 260 S.E.2d 120 (1979); Wall & Ochs, Inc. v. Hicks, 469 F. Supp. 873 (E.D.N.C. 1979); Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980); State v. Williams, 51 N.C. App. 613, 277 S.E.2d 546 (1981); State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981); State v. Maher, 54 N.C. App. 639, 284 S.E.2d 351 (1981); Lamb v. Wedgewood S. Corp., 55 N.C. App. 686, 286 S.E.2d 876 (1982); White v. Pate, 58 N.C. App. 402, 293 S.E.2d 601 (1982); State v. Barrett, 58 N.C. App. 515, 293 S.E.2d 896 (1982); Moore v. Swinson, 58 N.C. App. 714, 294 S.E.2d 381 (1982); State v. Deyton, 59 N.C. App. 326, 296 S.E.2d 497 (1982); White v. Pate, 308 N.C. 759, 304 S.E.2d 199 (1983); Duggins v. Town of Walnut Cove, 63 N.C. App. 684, 306 S.E.2d 186 (1983); In re Rogers, 63 N.C. App. 705, 306 S.E.2d 510 (1983); State v. McCleary, 65 N.C. App. 174, 308 S.E.2d 883 (1983); State v. Rogers, 68 N.C. App. 358, 315 S.E.2d 492 (1984); McDowell v. Estate of Anderson, 69 N.C. App. 725, 318 S.E.2d 258 (1984); State v. Rose, 312 N.C. 441, 323 S.E.2d 339 (1984); Pangburn v. Saad, 73 N.C. App. 336, 326 S.E.2d 365 (1985); State v. Raines, 319 N.C. 258, 354 S.E.2d 486 (1987); In re Murphy, 105 N.C. App. 651, 414 S.E.2d 396 (1992); State v. Bromfield, 332 N.C. 24, 418 S.E.2d 491 (1992); State v. Walker, 332 N.C. 520, 422 S.E.2d 716 (1992); Davis v. Town of Southern Pines, 116 N.C. App. 663, 449 S.E.2d 240 (1994); Eastern Appraisal Servs., Inc. v. State, 118 N.C. App. 692, 457 S.E.2d 312 (1995); State v. Miller, 344 N.C. 658, 477 S.E.2d 915 (1996); Thompson v. Farmer, 945 F. Supp. 109 (W.D.N.C. 1996); Myers v. Town of Landis, 957 F. Supp. 762 (M.D.N.C. 1996); State v. Hyatt, 132 N.C. App. 697, 513 S.E.2d 90 (1999); State v. Brogden, 137 N.C. App. 579, 528 S.E.2d 391, 2000 N.C. App. LEXIS 423 (2000); DOT v. Rowe, 138 N.C. App. 329, 531 S.E.2d 836, 2000 N.C. App. LEXIS 615 (2000); State v. Young, 140 N.C. App. 1, 535 S.E.2d 380, 2000 N.C. App. LEXIS 1042 (2000); State v. Guice, 141 N.C. App. 177, 541 S.E.2d 474, 2000 N.C. App. LEXIS 1402 (2000); State v. Barkley, 144 N.C. App. 514, 551 S.E.2d 131, 2001 N.C. App. LEXIS 531 (2001); Jordan v. Civil Serv. Bd., 153 N.C. App. 691, 570 S.E.2d 912, 2002 N.C. App. LEXIS 1245 (2002); State v. Smith, 155 N.C. App. 500, 573 S.E.2d 618, 2002 N.C. App. LEXIS 1636 (2002); Kling v. Harris Teeter Inc., 338 F. Supp. 2d 667, 2002 U.S. Dist. LEXIS 27657 (W.D.N.C. 2002); Wiggs v. Edgecombe County, 361 N.C. 318, 643 S.E.2d 904, 2007 N.C. LEXIS 411 (2007); State v. Corbett, 191 N.C. App. 1, 661 S.E.2d 759, 2008 N.C. App. LEXIS 1132 (2008); State v. McBennett, 191 N.C. App. 734, 664 S.E.2d 51, 2008 N.C. App. LEXIS 1486 (2008).

**Cited** in State v. Jones, 85 N.C. App. 56, 354 S.E.2d 251; State v. Miller, 339 N.C. 663, 455 S.E.2d 137; McKinney v. Board of Comm'rs, 278 N.C. 295, 179 S.E.2d 313 (1971); Plemmer v. Matthewson, 281 N.C. 722, 190 S.E.2d 204 (1972); Kenan v. Board of Adjustment, 13 N.C. App. 688, 187 S.E.2d 496 (1972); In re Reddy, 16 N.C. App. 520, 192 S.E.2d 621 (1972); Taylor v. Tri-County Elec. Membership Corp., 17 N.C. App. 143, 193 S.E.2d 402 (1972); State v. Watkins, 283 N.C. 17, 194 S.E.2d 800 (1973); Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973); State v. Foster, 284 N.C. 259, 200 S.E.2d 782 (1973); Sparrow v. Goodman, 376 F. Supp. 1268 (W.D.N.C. 1974); State v. Crabtree, 286 N.C. 541, 212 S.E.2d 103 (1975); State v. Woodson, 287 N.C. 578, 215 S.E.2d 607 (1975); In re Willis, 288 N.C. 1, 215 S.E.2d 771 (1975); Britt v. Britt, 26 N.C. App. 132, 215 S.E.2d 172 (1975); Painter v. Wake

County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975); State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975); Institutional Food House, Inc. v. Coble, 289 N.C. 123, 221 S.E.2d 297 (1976); In re Arcadia Dairy Farms, Inc., 289 N.C. 456, 223 S.E.2d 323 (1976); State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Admin. Office, 30 N.C. App. 427, 227 S.E.2d 603 (1976); State v. Terry, 30 N.C. App. 372, 226 S.E.2d 846 (1976); North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976); State v. Mathis, 293 N.C. 660, 239 S.E.2d 245 (1977); State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Admin. Office, 292 N.C. 1, 231 S.E.2d 867 (1977); Loughlin v. North Carolina State Bd. of Registration, 32 N.C. App. 351, 232 S.E.2d 219 (1977); Biltmore Co. v. Hawthorne, 32 N.C. App. 733, 233 S.E.2d 606 (1977); State v. Giles, 34 N.C. App. 112, 237 S.E.2d 305 (1977); North Carolina Auto. Rate Admin. Office v. Ingram, 35 N.C. 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## II. DUE PROCESS AND THE "LAW OF THE LAND".

**"Law of the Land".** — The term "law of the land" means the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the "law of the land." State ex rel. Caldwell v. Wilson, 121 N.C. 425, 121 N.C. 480, 28 S.E. 554, 28 S.E. 554 (1897); Parish v. East Coast Cedar Co., 133 N.C. 478, 45 S.E. 768, 98 Am. St. R. 718 (1903); State v. Collins, 169 N.C. 323, 84 S.E. 1049 (1915).

The term "law of the land" means the general law, the law which hears before it condemns;

which proceeds upon inquiry, and renders judgment only after trial. It means the regular course of the administration of justice through the courts of competent jurisdiction, after the manner of such courts. Procedure must be consistent with the fundamental principles of liberty and justice. State v. Chesson, 228 N.C. 259, 45 S.E.2d 563 (1947), writ dismissed, 334 U.S. 806, 68 S. Ct. 1185, 92 L. Ed. 1739 (1948). See also, Eason v. Spence, 232 N.C. 579, 61 S.E.2d 717 (1950).

The "law of the land" clause itself means that such legislative acts as profess in themselves directly to punish persons, or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode and usages of the common law as derived from our forefathers, are not effectually "laws of the land" for those purposes. Hoke v. Henderson, 15 N.C. 1 (1833); State v. Cutshall, 110 N.C. 538, 15 S.E. 261 (1892).

"Law of the land" clause of this section incorporates protections similar to those provided by the double jeopardy clause of the United States Constitution. State v. Ballenger, 123 N.C. App. 179, 472 S.E.2d 572 (1996), aff'd, 345 N.C. 626, 481 S.E.2d 84, cert. denied, 522 U.S. 817, 118 S. Ct. 68, 139 L. Ed. 2d 29 (1997).

**Wrongful Death Claim Precluded Constitutional Claim.** — The court dismissed the plaintiff-decedent's relative's claim that defendants, sheriff's deputies, violated the decedent's and his family's rights to substantive due process guaranteed by Article 1 of the North Carolina Constitution where a wrongful death claim could compensate the plaintiff for the same injuries or death as the state constitutional law claim. Olvera v. Edmundson, 151 F. Supp. 2d 700, 2001 U.S. Dist. LEXIS 10338 (W.D.N.C. 2001).

**The "law of the land" requires that the administration of justice be consistent with fundamental principles** of liberty and justice. State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

**And Requires Notice and Opportunity to Be Heard.** — Among other things, "the law of the land" or "due process of law" imports both notice and the opportunity to be heard before a competent tribunal. Parker v. Stewart, 29 N.C. App. 747, 225 S.E.2d 632 (1976); Utica Mut. Ins. Co. v. Johnson, 41 N.C. App. 299, 254 S.E.2d 643 (1979).

The "law of the land" clause contained in this section mandates that a party be given notice and an opportunity to be heard before he or she can be deprived of a legal claim or defense. First Union Nat'l Bank v. Rolfe, 83 N.C. App. 625, 351 S.E.2d 117 (1986).

Mother's motion regarding custody and child support asked the trial court to enter an order modifying and increasing child support and to instruct the father to pay the ordered support each month without deductions; this notice clearly apprised the father that the hearing would include child support issues, including arrearages, and satisfied due process. Swanson v. Herschel, 174 N.C. App. 803, 622 S.E.2d 159, 2005 N.C. App. LEXIS 2615 (2005).

**Restraints Imposed on Police Power by "Law of the Land".** — The "law of the land" imposes flexible restraints on the exercise of the State police power, which are satisfied if the act in question is not unreasonable, arbitrary or capricious and the means selected have a real and substantial relation to the objects sought to be attained. State v. Whitaker, 228 N.C. 352, 45 S.E.2d 860 (1947), aff'd, 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212 (1949).

**The "law of the land" is equivalent to "due process of law."** State v. Collins, 169 N.C. 323, 84 S.E. 1049 (1915); State v. Ballance, 229 N.C. 764, 51 S.E.2d 731 (1949). See National Sur. Corp. v. Sharpe, 232 N.C. 98, 59 S.E.2d 593 (1950); Eason v. Spence, 232 N.C. 579, 61 S.E.2d 717 (1950); Sale v. State Hwy. & Pub. Works Comm'n, 242 N.C. 612, 89 S.E.2d 290 (1955); State v. Perry, 248 N.C. 334, 103 S.E.2d 404 (1958); ET & WNC Transp. Co. v. Currie, 248 N.C. 560, 104 S.E.2d 403 (1958), aff'd, 359 U.S. 28, 79 S. Ct. 602, 3 L. Ed. 2d 625, rehearing denied, 359 U.S. 976, 79 S. Ct. 874, 3 L. Ed. 2d 843 (1959); State v. Parrish, 254 N.C. 301, 118 S.E.2d 786 (1961); State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961); GI Surplus Store v. Hunter, 257 N.C. 206, 125 S.E.2d 764 (1962); Rice v. Rigsby, 259 N.C. 506, 131 S.E.2d 469 (1963); Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970); State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982); Bulova Watch Co. v. Brand Distrib. of N. Wilkesboro, Inc., 285 N.C. 467, 206 S.E.2d 141 (1974); Smith v. Keator, 285 N.C. 530, 206 S.E.2d 203, appeal dismissed, 419 U.S. 1043, 95 S. Ct. 613, 42 L. Ed. 2d 636 (1974); In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976); State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976); A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

The term "law of the land," as used in this section, is synonymous with "due process of law" as that term is applied under U.S. Const., Amend. XIV. In re Smith, 82 N.C. App. 107, 345 S.E.2d 423 (1986); State v. Smith, 90 N.C. App. 161, 368 S.E.2d 33 (1988), aff'd, 323 N.C. 703, 374 S.E.2d 866, cert. denied, 490 U.S. 1100, 109 S. Ct. 2453, 104 L. Ed. 2d 1007 (1989); McNeill v. Harnett County, 327 N.C. 552, 398 S.E.2d 475 (1990).

**"Due process" has a dual significance,** as it pertains to procedure and substantive law. State v. Smith, 265 N.C. 173, 143 S.E.2d 293 (1965); In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

**In substantive law, due process may be**

**characterized as a standard of reasonableness,** and as such it is a limitation upon the exercise of the police power. State v. Smith, 265 N.C. 173, 143 S.E.2d 293 (1965); In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

**The traditional substantive due process test** has been that a statute must have a rational relation to a valid State objective. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

**No Substantive Due Process Claim Stated.** — Plaintiffs' substantive due process claim failed to state a claim for numerous reasons; to the extent plaintiffs sought payment under an agreement with a risk-management program provided by the North Carolina School Board's Trust, and claimed that the county school board violated substantive due process in not paying their claim, plaintiffs failed to state a claim upon which relief could be granted as the Trust was responsible for determining the merits of and paying any claim. Plaintiffs failed to make any allegation of any egregious or outrageous action on the part of the board for failing to pay plaintiffs and plaintiffs' substantive due process claim failed as a matter of law under rational basis review; and plaintiffs failed to allege the existence of a right that the board violated in failing to pay plaintiffs. Frye v. Brunswick County Bd. of Educ., 612 F. Supp. 2d 694, 2009 U.S. Dist. LEXIS 18084 (E.D.N.C. 2009).

**Whether a statute violates the law of the land clause is a question of degree** and reasonableness in relation to the public good likely to result from it. Lowe v. Tarble, 313 N.C. 460, 329 S.E.2d 648 (1985).

**Federal Due Process Decisions Persuasive.** — "Law of the land" is equivalent to the federal Fourteenth Amendment "due process of law," and federal court interpretations of the latter, though not binding, are highly persuasive in construing our own amendment. Armstrong v. Armstrong, 85 N.C. App. 93, 354 S.E.2d 350 (1987), rev'd on other grounds, 322 N.C. 396, 368 S.E.2d 595 (1988); State v. Smith, 90 N.C. App. 161, 368 S.E.2d 33 (1988), aff'd, 323 N.C. 703, 374 S.E.2d 866, cert. denied, 490 U.S. 1100, 109 S. Ct. 2453, 104 L. Ed. 2d 1007 (1989).

**A decision of the Supreme Court of the United States construing the due process clause** of U.S. Const., Amend. XIV, although persuasive, does not control an interpretation by the Supreme Court of this State of the "law of the land" clause in this section. Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970), overruled on other grounds, State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982); Bulova Watch Co. v. Brand Distrib. of N. Wilkesboro, Inc., 285 N.C. 467, 206 S.E.2d 141 (1974).

Although the "law of the land" clause in this section is synonymous with U.S. Const., Amend. XIV due process, federal court interpretations of due process, though highly persuasive, are not binding on North Carolina courts. Thus, an independent determination of defendant's constitutional rights under the law of the land provision must be made. Gaston Bd. of Realtors, Inc. v. Harrison, 64 N.C. App. 29, 306 S.E.2d 809 (1983), rev'd on other grounds, 311 N.C. 230, 316 S.E.2d 59 (1984).

"Law of the land" is synonymous with "due process of law" under the Fourteenth Amendment, and United States Supreme Court interpretations of the latter, though not binding, are highly persuasive in construing the former. Bentley v. North Carolina Ins. Guar. Ass'n, 107 N.C. App. 1, 418 S.E.2d 705 (1992); Evans v. Cowan, 132 N.C. App. 1, 510 S.E.2d 170 (1999).

The North Carolina Law of the Land Clause is generally considered the equivalent of the Due Process Clause and has been interpreted as requiring that neither property nor liberty may be deprived but by the general law; although a decision of the United States Supreme Court construing the Due Process Clause is persuasive in interpreting a claim brought under the North Carolina Law of the Land Clause, it is not controlling. Lorbacher v. Housing Auth., 127 N.C. App. 663, 493 S.E.2d 74 (1997).

**The North Carolina Supreme Court would employ a different method for deciding what procedural safeguards are due** under the "law of the land" clause to a person deprived of a protected interest than the United States Supreme Court has proposed for deciding similar questions under the due process clause. Henry v. Edmisten, 315 N.C. 474, 340 S.E.2d 720 (1986).

**Statute Must Serve Legitimate Purpose and Be Rationally Related Thereto.** — For a statute to be within the limits set by the federal due process clause and the North Carolina "law of the land" provision, all that is required is that the statute serve a legitimate purpose of state government and be rationally related to the achievement of that purpose. Shipman v. North Carolina Private Protective Servs. Bd., 82 N.C. App. 441, 346 S.E.2d 295, cert. denied and appeal dismissed, 318 N.C. 509, 349 S.E.2d 866 (1986).

**DWI Seizure Statutes were held constitutional** in spite of a "law of the land" challenge, indicating that these statutes have a legitimate objective — keeping impaired drivers and their cars off of the roads — and that the means chosen to further the goals — seizing the cars, even when they belong to people other than the drivers — is directly related to said objective. State v. Chisholm, 135 N.C. App. 578, 521 S.E.2d 487, 1999 N.C. App. LEXIS 1182 (1999).

**County's Rejection of Low Bid Found Reasonable.** — The county's reasons for rejecting the low bidder's bid to operate a county-owned landfill were reasonable to relation to the government's objective to protect the health and safety of its citizens, and thus, its rejection of the bid was not arbitrary or capricious. City-Wide Asphalt Paving, Inc. v. Alamance County, 132 N.C. App. 347, 513 S.E.2d 335 (1999).

**A legitimate entitlement does not always rise to the level of "property"** protected against "taking" by the due process clause of the State and federal Constitutions. Armstrong v. Armstrong, 85 N.C. App. 93, 354 S.E.2d 350 (1987), rev'd on other grounds, 322 N.C. 396, 368 S.E.2d 595 (1988).

**No Property Right in At-Will Employment.** — The trial court erred in failing to grant summary judgment for defendant-state agency where plaintiff, a county extension director, was an employee at-will with no cognizable property right in his employment and, therefore, barred from bringing a due process claim. McCallum v. North Carolina Coop. Extension Serv., 142 N.C. App. 48, 542 S.E.2d 227, 2001 N.C. App. LEXIS 51 (2001), cert. denied, 353 N.C. 452, 548 S.E.2d 527 (2001).

To the extent that plaintiff sought to challenge his discharge from state employment under the law of the land clause of the North Carolina constitution, that claim required a property interest, and because plaintiff lacked a property interest in his employment under state law (plaintiff was an employee at will), such a claim failed. Whitesell v. Town of Morrisville, 446 F. Supp. 2d 419, 2006 U.S. Dist. LEXIS 61074 (E.D.N.C. 2006).

Former employee alleged that he had a property interest in continued employment with the City, as created by the City's policy and adopted by ordinance, and that the City violated his due process rights by failing to provide him certain appeal rights following the termination of his employment; however, the employee remained an at-will employee, and the City did not create a property right in his employment when the City adopted the policy. Because the employee had no enforceable property interest, it was unnecessary to address whether the City followed the procedures in the policy; as with the employee's federal due process claim, the absence of a protected property interest doomed the employee's claim under the state constitution. Roberson v. City of Goldsboro, 564 F. Supp. 2d 526, 2008 U.S. Dist. LEXIS 39716 (E.D.N.C. 2008).

**Right to military retirement pay is not a constitutionally protected "vested property right";** the right to retirement pay is a creature of federal statute, not private contract. Armstrong v. Armstrong, 85 N.C. App. 93, 354 S.E.2d 350 (1987), rev'd on other grounds, 322 N.C. 396, 368 S.E.2d 595 (1988).

**Reclassification of Retirement Pay as Marital Property.** — Defendant's right to his retirement pay was "vested" such that it could be included as marital property under G.S. 50-20(b), yet his right to this government benefit was never "so far perfected as to permit no statutory interference." Thus the legislature's reclassification of defendant's military retirement pay as marital property violated neither the Constitutional guarantees of due process nor the law of the land. Armstrong v. Armstrong, 85 N.C. App. 93, 354 S.E.2d 350 (1987), rev'd on other grounds, 322 N.C. 396, 368 S.E.2d 595 (1988).

**A tenant in a publicly subsidized housing project is entitled to due process protection.** Roanoke Chowan Regional Hous. Auth. v. Vaughan, 81 N.C. App. 354, 344 S.E.2d 578, cert. denied, 317 N.C. 706, 347 S.E.2d 439 (1986).

**When the furtherance of a legitimate state interest requires the State to engage in prompt remedial action** adverse to an individual interest protected by law, and the action proposed by the State is reasonably related to furthering the state's interest, the law of the land ordinarily requires no more than that before such action is undertaken, a judicial officer determine that there is probable cause to believe that the conditions which would justify the action exist. Henry v. Edmisten, 315 N.C. 474, 340 S.E.2d 720 (1986).

**Right of Litigant to Discovery.** — The defendant attorney's due process rights were violated by the Disciplinary Hearing Committee's failure to compel production of the State Bar investigator's witness interview notes and memoranda to defense counsel, insofar as they related to matters to which the investigator testified; by allowing its investigator to testify in defendant's disciplinary hearing, the State Bar waived any immunity under the attorney-work product doctrine as to matters testified to by the investigator that were contained in his notes. North Carolina State Bar v. Harris, 139 N.C. App. 822, 535 S.E.2d 74, 2000 N.C. App. LEXIS 1037 (2000).

Where the inmate's civil conspiracy action was dismissed for failure to state a claim pursuant to G.S. 1A-1, N.C. R. Civ. P. 12(b)(6), the inmate's due process rights under N.C. Const., Art. I, § 19 were not denied, as the dismissal obviated the parties' need to prepare for trial and to clarify or narrow the issues. Dove v. Harvey, 168 N.C. App. 687, 608 S.E.2d 798, 2005 N.C. App. LEXIS 447 (2005), cert. denied, — N.C. —, 628 S.E.2d 249 (2006).

Trial court properly denied defendant's motions to strike the death penalty and to suppress ballistics evidence. Because the State's failure to preserve potentially useful evidence from a crime scene was negligent at worst and there was no suggestion of bad faith; defendant's due process rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and N.C. Const., Art. I, §§ 19 and 23 were not violated. State v. Taylor, 362 N.C. 514, 669 S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

**Right of Litigant to An Adequate and Fair Hearing.** — The "law of the land" clause embodied in this section guarantees to the litigant in every kind of judicial proceeding the right to an adequate and fair hearing before he can be deprived of his claim or defense by judicial decree. And where the claim or defense turns upon a factual adjudication, the constitutional right of the litigant to an adequate and fair hearing requires that he be apprised of all the evidence received by the court and be given an opportunity to test, explain, or rebut it. In re Gupton, 238 N.C. 303, 77 S.E.2d 716 (1953).

G.S. 160A-299(b) did not deprive a home owner of his right to a fair hearing or violate the Separation of Powers Clause of the North Carolina Constitution in his appeal from a town council order closing a road because he had the opportunity to test, rebut, and explain evidence presented to the council at three public hearings held on the road closure over a two-month period; these hearings were the proper place for him to present evidence and to rebut any evidence contrary to his position. Houston v. Town of Chapel Hill, 177 N.C. App. 739, 630 S.E.2d 249, 2006 N.C. App. LEXIS 1199 (2006).

**And to Notice and Opportunity to Be Heard.** — The essential elements of the "law of the land" are notice and opportunity to be heard or defend, before a competent tribunal, in an orderly proceeding adapted to the nature of the case, which is uniform and regular, and in accord with established rules which do not violate fundamental rights. Eason v. Spence, 232 N.C. 579, 61 S.E.2d 717 (1950).

Under the "law of the land" clause of this section, a judgment cannot bind a person unless he is brought before the court in some way sanctioned by law and afforded an opportunity to be heard in defense of his right. Eason v. Spence, 232 N.C. 579, 61 S.E.2d 717 (1950); State ex rel. Bowman v. Malloy, 264 N.C. 396, 141 S.E.2d 796 (1965).

Due process of law implies the right and opportunity to be heard and to prepare for hearing. In re Wilson, 257 N.C. 593, 126 S.E.2d 489 (1962).

Due process of law requires that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense. State v. Covington, 258 N.C. 495, 128 S.E.2d 822 (1963).

The "law of the land" and "due process of law" provisions of the State and federal Constitutions require notice and an opportunity to be heard before a citizen may be deprived of his property. McMillan v. Robeson County, 262 N.C. 413, 137 S.E.2d 105 (1964); City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966). See also, Sutton v. Davenport, 258 N.C. 27, 128 S.E.2d 16 (1962).

As to procedure, due process means notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a competent and impartial tribunal having jurisdiction of the cause. State v. Smith, 265 N.C. 173, 143 S.E.2d 293 (1965); In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

The "law of the land" clause embodied in this section guarantees to the litigant in every kind of judicial proceeding the right to an adequate and fair hearing before he can be deprived of his claim or defense by judicial decree; where the claim or defense turns upon a factual adjudication, the constitutional right of the litigant to an adequate and fair hearing requires that he be apprised of all the evidence received by the court and given an opportunity to test, explain, or rebut it. Shepherd v. Shepherd, 273 N.C. 71, 159 S.E.2d 357 (1968).

In order that there be a valid adjudication of a party's rights, he must be given notice of the action and an opportunity to assert his defense, and he must be a party to such proceeding. In re Wilson, 13 N.C. App. 151, 185 S.E.2d 323 (1971).

Both the "law of the land" and due process of law import notice and an opportunity to be heard or defend in a regular proceeding before a competent tribunal. Smith v. Keator, 285 N.C. 530, 206 S.E.2d 203, appeal dismissed, 419 U.S. 1043, 95 S. Ct. 613, 42 L. Ed. 2d 636 (1974).

The defendant, who had defaulted on the original complaint which alleged that she was a resident of this State, was entitled to notice of the plaintiff's subsequent motion to declare that none of her property was exempt by virtue of non-residency and an opportunity to contest the factual allegations as to her non-residency; where she was given neither notice nor an opportunity to be heard, in violation of statutory and constitutional provisions, the order declaring that her property was not exempt was invalid, and she was entitled to relief therefrom pursuant to G.S. 1A-1, Rule 60(b)(4). First Union Nat'l Bank v. Rolfe, 83 N.C. App. 625, 351 S.E.2d 117 (1986).

When a trial court granted children's custody to their grandparents in a distant state, the mother's due process rights were not violated because she had notice of and participated in all relevant hearings. In re Padgett, 156 N.C. App. 644, 577 S.E.2d 337, 2003 N.C. App. LEXIS 324 (2003).

Alleged father's due process rights were violated where the trial court precluded him from participating in a hearing on a termination of parental rights hearing after a paternity test indicated that there was a zero possibility that he was the child's father because the presumption established by the paternity test was nevertheless rebuttable. In re L.D.B., 168 N.C.

App. 206, 617 S.E.2d 288, 2005 N.C. App. LEXIS 165 (2005).

North Carolina Industrial Commission's decision that a workers' compensation claimant had sustained a change in condition was reversed as an employer did not have notice that the Commission would address a change in condition or the claimant's inability to comply with a mandated work schedule as the Commission had concluded that evidence that the claimant's condition had worsened was not relevant. Branch v. Carolina Shoe Co., 172 N.C. App. 511, 616 S.E.2d 378, 2005 N.C. App. LEXIS 1802 (2005).

Because a former shareholder and the former shareholder's counsel were given notice of the bases of the alleged sanctions against them and an opportunity to present arguments and testimony on their behalf, their due process rights guaranteed by U.S. Const., Amend. XIV and N.C. Const., Art. I, § 19 were fully protected. Egelhof v. Szulik, — N.C. App. —, 668 S.E.2d 367, 2008 N.C. App. LEXIS 2026 (2008).

**The notice required by this constitutional provision is the notice inherent in the original process** whereby the court acquires original jurisdiction, and not notice of the time when the jurisdiction vested in the court by the service of the original process will be exercised. Collins v. North Carolina State Hwy. & Pub. Works Comm'n, 237 N.C. 277, 74 S.E.2d 709 (1953).

**And to Notice and Opportunity to Be Heard.** — The right of a defendant charged with a criminal offense to present to the jury his version of the facts is a fundamental element of due process of law, guaranteed by the federal and state constitutions. State v. Locklear, 349 N.C. 118, 505 S.E.2d 277 (1998), cert. denied, 526 U.S. 1075, 119 S. Ct. 1475, 143 L. Ed. 2d 559 (1999).

**Notice is not a prerequisite to determination of questions of a political nature,** such as the necessity and expediency of a taking, but is only necessary prior to the determination of the issue of just compensation. City of Durham v. Manson, 21 N.C. App. 161, 204 S.E.2d 41, modified on other grounds, 285 N.C. 741, 208 S.E.2d 662 (1974).

The due process clause is not violated by failure to give the owner of property an opportunity to be heard as to the necessity and extent of appropriating his property to public use; but it is essential to due process that the mode of determining the compensation to be paid for the appropriation be such as to afford the owner an opportunity to be heard. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

**Appraisal clause did not deprive plaintiff of his right** to due process under the North Carolina Constitution. Bentley v. North Carolina Ins. Guar. Ass'n, 107 N.C. App. 1, 418 S.E.2d 705 (1992).

**Definition of Term in Criminal Statute.** — Failure to define the term "deadly weapon" in G.S. 14-17 does not result in the statute being unconstitutionally vague. Furthermore, because North Carolina cases provide adequate notice of what constitutes a deadly weapon, defendant has not been deprived of due process. State v. Jones, 133 N.C. App. 448, 516 S.E.2d 405 (1999), aff'd in part, rev'd in part on other grounds, and remanded, 353 N.C. 159, 538 S.E.2d 917 (2000).

**Court reporter's allegedly poor transcription of murder trial proceedings** did not deny defendant due process where defendant failed to point to any significantly incoherent, inconsistent or senseless language in the transcript, where there was no indication of efforts to work with either the court reporter or the district attorney to attempt to correct them and where there was no suggestion that the transcript could not have been reconstructed if this were truly necessary for a proper understanding of the case on appeal. State v. Robinson, 327 N.C. 346, 395 S.E.2d 402 (1990).

**The chemical analysis statute** (G.S. 20-139.1) does not violate the Law of the Land Clause of Art. I, § 19 of the North Carolina Constitution. State v. Jones, 106 N.C. App. 214, 415 S.E.2d 774 (1992).

**Commitment Proceedings.** — An order for the commitment of a person to a mental hospital is essentially a judgment by which he is deprived of his liberty, and it is a cardinal principle of English jurisprudence that before any judgment can be pronounced against a person there must have been a trial of the issue upon which the judgment is given. In re Wilson, 257 N.C. 593, 126 S.E.2d 489 (1962).

**Dismissal Proceedings.** — Due process under the United States and North Carolina Constitutions requires that a permanent State employee who has been dismissed be provided with a statement in writing setting forth his rights of appeal before time limits for notice of appeal commence to run. Luck v. Employment Sec. Comm'n, 50 N.C. App. 192, 272 S.E.2d 607 (1980).

**Domestic Proceedings.** — An adjudication affecting the marital status and finally determining personal and property obligations must be preceded by notice and an opportunity to be heard. McLean v. McLean, 233 N.C. 139, 63 S.E.2d 138 (1951).

**Parental Rights.** — Trial court's factual finding that the father was fit to raise his minor child did not preclude the trial court from making the legal conclusion that the father, in engaging in conduct constituting abandonment and neglect of the minor child, acted in a manner inconsistent with his constitutionally-protected status as a parent; however, the trial court erred because it was required to find the existence of that conduct by clear and convincing evidence, which it did not do. David N. v. Jason N., 359 N.C. 303, 608 S.E.2d 751, 2005 N.C. LEXIS 205 (2005).

**Denial of Parents' Rights.** — Where the court merely recited the testimony of witnesses and did not make the required findings of fact, further findings of fact and a determination of the father's parental fitness was needed if he was to be denied all contact with his daughter. Moore v. Moore, 160 N.C. App. 569, 587 S.E.2d 74, 2003 N.C. App. LEXIS 1827 (2003).

**Right to Engage in Legitimate Business.** — Court of appeals, in upholding a dental board's rule, stated that the right to engage in legitimate business was not fundamental for purposes of federal due process analysis, and so applied a rational basis rather than strict scrutiny approach in its substantive due process and equal protection analysis. Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs, 153 N.C. App. 527, 571 S.E.2d 52 (2002).

**License Revocation.** — Where county commissioners attempted to commission sheriff as a special tribunal to conduct hearings on alleged violations of county ordinance, the provisions for revocation of licenses of massage parlors after a hearing before the sheriff did not afford the constitutionally required "opportunity to be heard or defend in a regular proceeding before a competent tribunal." Parker v. Stewart, 29 N.C. App. 747, 225 S.E.2d 632 (1976).

**Dental Board Rules.** — Court of Appeals upheld validity of N.C. Admin. Code tit. 21, 16X.0101 related to prohibiting certain business services that might control the business activities or clinical/professional services of a licensed dentist or a dental entity; it was adopted in accordance with the Administrative Procedure Act, did not violate N.C. Const., Art. I, § 19 "law of the land", substantive, and procedural due process, and equal protection protections, and was rationally related to a legitimate public interest: to protect the public health and welfare with respect to the practice of dentistry. Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs, 153 N.C. App. 527, 571 S.E.2d 52 (2002).

**Rate Hearings.** — The Utilities Commission must determine a petition for an increase in telephone rates on the basis of the facts existing at the time such increase is effective, and if a subsequent change in conditions warrants a new rate, such new rate must relate to the date of change and the parties must be accorded an opportunity to be heard with respect to the effect, if any, such change had on the rate structure; a denial of such opportunity would be a deprivation of due process. State ex rel. North Carolina Utils. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 132 S.E.2d 873 (1963).

The origin of G.S. 62-133 supports the inference that the legislature intended for the Utilities Commission to fix rates as low as may be reasonably consistent with the requirements of the due process clause of U.S. Const., Amend. XIV, those of this section, being the same in this respect. State ex rel. Utils. Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

An order entered ex parte, allowing a utility to effectuate a fuel adjustment clause, did not, in view of the procedures available to contest such action, violate this section. State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

**Investor Suits.** — In a suit by investors, the trial court properly held that it lacked personal jurisdiction under G.S. 1-75.4(4) or (5) over a Isle of Guernsey resident who was a director of a Guernsey corporation, as the investors had not been solicited by the resident or on his behalf and money had not been transferred to him on his order or direction; moreover, there were no minimum contacts, as the resident's uncontradicted affidavit indicated that he had never met or spoken with the investors, visited North Carolina, or given investment advice to the investors. Robbins v. Ingham, — N.C. App. —, 635 S.E.2d 610, 2006 N.C. App. LEXIS 2160 (2006), cert. denied, appeal dismissed, 361 N.C. 221 (2007).

**Passage of Ordinance Mandating Connection to Sewer System.** — The law of the land clause does not require notice and opportunity for hearing prior to the passage of an ordinance mandating connection to a sewer system adopted under the authority of G.S. 153A-284; to require notice and opportunity for hearing to all individual property owners prior to the adoption of an ordinance mandating connection of improved properties pursuant to the enabling act would be burdensome, costly to local governments, and not consistent with procedures employed in the exercise of other police powers. McNeill v. Harnett County, 327 N.C. 552, 398 S.E.2d 475 (1990).

**No Due Process Right of Entitlement in Terminable at Will Contract.** — Where there was nothing in the record which suggested that plaintiff had a contract for a definite term, her contract of employment was terminable at the will of either party, irrespective of the quality of performance, and plaintiff had no property interest in employment and no legitimate claim of entitlement under the due process clause. Peele v. Provident Mut. Life Ins. Co., 90 N.C. App. 447, 368 S.E.2d 892, appeal dismissed, 323 N.C. 366, 373 S.E.2d 547 (1988).

City of Charlotte's grievance procedure was not adopted pursuant to an ordinance or expressly incorporated by the City Council into plaintiff's employment contract and the undisputed material facts show that plaintiff was nothing more than an "at-will" employee, and, therefore, he was not entitled to the procedural safeguards of U.S. Const., Amend. XIV or N.C. Const., Art. I, § 19 prior to termination. Reid v. White, 703 F. Supp. 428 (W.D.N.C. 1988).

A nurse practitioner was an at-will employee who did not have a property interest in her position with a state university necessary to bring a claim for her discharge under this clause, despite having given up another opportunity based on promises that were not fulfilled. Evans v. Cowan, 132 N.C. App. 1, 510 S.E.2d 170 (1999).

Plaintiffs who made no claim that they were exempted from the employment-at-will rule other than that their employment was subject to a general order allowing appeal to a Termination Review Board had no property interest in the employment which could form the basis for a denial of due process. Buchanan v. Hight, 133 N.C. App. 299, 515 S.E.2d 225 (1999).

**Unilateral Expectation of Continued Employment Did Not Create Property Interest.** — Plaintiff failed to raise genuine issue of material fact that he had more than a unilateral expectation of continued employment and such abstract desires are insufficient to create a property interest protected under U.S. Const., Amend. XIV or N.C. Const., Art. I, § 19. Reid v. White, 703 F. Supp. 428 (W.D.N.C. 1988).

**Due Process "Property" Interest in Continued Employment.** — Statutory creation of personnel advisory board for sheriff's department to hear appeals of employee dismissal and disciplinary action, receive evidence, and make recommendations to sheriff gave right to dismissed employees to appeal to the board and gave employees due process "property" interest in continued employment. Penland v. Long, 922 F. Supp. 1085 (W.D.N.C. 1996), rev'd on other grounds, 102 F.3d 722 (4th Cir. 1996).

Personnel memoranda issued by a terminated police officer's employer did not grant him a recognizable property interest under this section, where the officer argued that he was terminated without having been afforded the procedures set forth in the city's personnel policies memoranda. Wuchte v. McNeil, 130 N.C. App. 738, 505 S.E.2d 142 (1998).

Summary judgment for a city in an employee's substantive due process claim arising from the termination of her employment was proper because, inter alia, under Winston-Salem Code of Ordinances § 50-104(g), the employee was never entitled to collect retirement benefits upon her disability and, thus, her interest in those benefits was not a protected property interest; under its code, the city reserved the option to transfer a disabled police officer to another position in the police department or elsewhere in the city. Further, the employee presented no genuine issue as to any arbitrary governmental action that would have substantiated her claim that the city violated her substantive due process rights. Tripp v. City of Winston-Salem, 188 N.C. App. 577, 655 S.E.2d 890, 2008 N.C. App. LEXIS 193 (2008).

**Plaintiff did not secure a property interest in continued employment** either through the provisions of the Wilmington, NC Code or through assurances made by his superiors, and the "law of the land" clause of this section was not violated by defendant's termination of plaintiff. Woods v. City of Wilmington, 125 N.C. App. 226, 480 S.E.2d 429 (1997).

**Due Process "Liberty" Interest in Employees' Reputations.** — A constitutional liberty interest was implicated and the right to procedural due process required when statements of sheriff suggested employees of jail were involved in assault on inmate, and employees were dismissed, which could falsely stigmatize employees, who had a statutory right to appeal dismissal to personnel advisory board for sheriff's department. Penland v. Long, 922 F. Supp. 1085 (W.D.N.C. 1996), rev'd on other grounds, 102 F.3d 722 (4th Cir. 1996).

**Utilities Commission's order requiring that monies collected** pursuant to a line loss and compressor fuel charge be included in the Industrial Sales Trucker (IST) did not amount to an impairment of contract in violation of U.S. Const., Art. I, § 10 nor an unlawful taking of property other than by the law of the land or without due process in violation of N.C. Const., Art. I, § 19. State ex rel. Utilities Comm'n v. North Carolina Natural Gas Corp., 323 N.C. 630, 375 S.E.2d 147 (1989).

**Reasonable Exercise of State Police Power.** — This section imposes flexible restraints on the exercise of state police power which are satisfied if the act in question is not unreasonable, arbitrary or capricious, and ... the means selected shall have a real and substantial relation to the object sought to be obtained. McNeill v. Harnett County, 327 N.C. 552, 398 S.E.2d 475 (1990).

**Establishment and Operation of Sewer System.** — The establishment and operation of a sewer system by the sewer district and the county is a valid exercise of the police power under this section. McNeill v. Harnett County, 327 N.C. 552, 398 S.E.2d 475 (1990).

**Settlement Proceedings.** — Discretion given trial court by subsection (j) of G.S. 97-10.2 (statute giving trial court discretion as to how to distribute settlement proceeds from third-party tort-feasor's insurer between injured worker and workers' compensation carrier) does not violate United States Constitution or this section. Allen v. Rupard, 100 N.C. App. 490, 397 S.E.2d 330 (1990), appeal withdrawn, 328 N.C. 328, 404 S.E.2d 864 (1992).

**Where a trial court's order specifically**

**provided that the healthcare companies had the right to choose arbitration with one arbitrator or go to trial, the order did not deny the healthcare companies the right to arbitrate;** accordingly, the trial court's interlocutory order did not affect a substantial right and the appeal had to be dismissed. Franck v. Choon Heong P'Ng, 156 N.C. App. 691, 577 S.E.2d 141, 2003 N.C. App. LEXIS 202 (2003).

**Inclusion of Monies in Industrial Sales Tracker Was Not Unlawful Taking of Property.** — The Utilities Commission's order requiring that monies collected pursuant to a line loss and compressor fuel charge be included in the Industrial Sales Tracker (IST) did not amount to an impairment of contract in violation of U.S. Const., Art. I, § 10 nor an unlawful taking of property other than by the law of the land or without due process in violation of N.C. Const., Art. I, § 19. State ex rel. Utils. Comm'n v. North Carolina Natural Gas Corp., 323 N.C. 630, 375 S.E.2d 147 (1989).

**Water and Sewer Line Connection Charges.** — G.S. 153A-284 and the county mandating ordinances met the requirements of both the federal and State Constitutions in authorizing the imposition of connection charges and user/availability fees related to mandated connections. McNeill v. Harnett County, 327 N.C. 552, 398 S.E.2d 475 (1990).

**County Denial of Access to Sewer Line for Improper Motives.** — Where county denied access to sewer line based on improper motives, the denial of a benefit for an unrelated reason constituted a violation of due process principles. Browning-Ferris Indus. of S. Atl., Inc. v. Wake County, 905 F. Supp. 312 (E.D.N.C. 1995).

**County ordinance regulating off-premises signs larger than 15 square feet** held to meet the constitutional requirements of due process. Summey Outdoor Adv., Inc. v. County of Henderson, 96 N.C. App. 533, 386 S.E.2d 439 (1989).

**Jury Instructions.** — While trial court's jury instructions may have been confusing initially, the court ultimately set forth the required elements as to felonious assault with a deadly weapon inflicting serious injury and, therefore, did not violate the defendant's constitutional rights under this section and N.C. Const., Art. I, §§ 23 and 27. State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

Pattern jury instruction used by trial court was internally consistent and meaningful, and did not misuse the term "extenuating," nor define the term "mitigating circumstance" in such a way as to confuse jurors or violate defendant's due process and fundamental fairness rights. State v. Peterson, 350 N.C. 518, 516 S.E.2d 131, 1999 N.C. App. LEXIS 419 (1999), cert. denied, 528 U.S. 1164, 120 S. Ct. 1181, 145 L. Ed. 2d 1087 (2000).

Failure to charge jury with exact language requested by defendant did not violate defendant's rights under the Eighth or Fourteenth Amendments or N.C. Const., Art. I, §§ 19 or 27, where the trial court used the pattern jury instruction to given in substance those of defendant's requested instructions which were correct in the law. State v. Morgan, 359 N.C. 131, 604 S.E.2d 886, 2004 N.C. LEXIS 1199 (2004).

**Probation Revocation Proceedings.** — There was no violation of defendant's right to due process or any statutory violation in revoking defendant's probation as: (1) defendant received notice of defendant's alleged probation violations, and a hearing was held; (2) defendant admitted to the first two violations contained in the probation violation report; and (3) unlike when a defendant pleads guilty, there was no requirement such as that imposed under G.S. 15A-1022 that the trial court personally examine defendant regarding defendant's admission that defendant violated defendant's probation. State v. Sellers, 185 N.C. App. 726, 649 S.E.2d 656, 2007 N.C. App. LEXIS 1939 (2007).

**Prosecutor's Comments.** — Prosecutor's arguments, including statements comparing defendant's cozy life in prison and his numerous protections under the Constitution with victims' lack of opportunities, was unlikely to have influenced the jury's sentencing recommendations and, therefore, did not deny the defendant his constitutional due process rights. State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

Defendant's objection to a prosecutor's closing argument, in which the prosecutor stated that defense counsel's job was "to defend [and] not to explain, not to be even, not to be fair," was properly overruled, as: (1) the prosecutor neither used abusive, vituperative, and opprobrious language, nor did the prosecutor's comments amount to an offensive personal reference about defense counsel; (2) the prosecutor's statements attempted to explain the role of defense counsel, but did not attack defense counsel; (3) when considered within the context of the prosecutor's entire closing argument, the statements did not violate G.S. 15A-1230(a) or defendant's due process rights under the Fourteenth Amendment and N.C. Const., Art. I, § 19; and (4) defendant failed to show how the prosecutor's statements prejudiced defendant. State v. Brown, 182 N.C. App. 277, 641 S.E.2d 850, 2007 N.C. App. LEXIS 574 (2007).

**A party moving for a new trial grounded upon misrepresentation by a juror during**

**voir dire must show:** (1) the juror concealed material information during voir dire; (2) the moving party exercised due diligence during voir dire to uncover the information; (3) and the juror demonstrated actual bias or bias implied as a matter of law that prejudiced the moving party. State v. Buckom, 126 N.C. App. 368, 485 S.E.2d 319 (1997), cert. denied, 522 U.S. 973, 118 S. Ct. 425, 139 L. Ed. 2d 326 (1998).

**Denial of a party's right to exercise intelligent peremptory strikes, based solely upon juror misrepresentation during voir dire,** is not guaranteed by Art. I, §§ 19 and 24 of the North Carolina Constitution. State v. Buckom, 126 N.C. App. 368, 485 S.E.2d 319 (1997), cert. denied, 522 U.S. 973, 118 S. Ct. 425, 139 L. Ed. 2d 326 (1998).

**Trial court did not deprive the defendant of a fair trial by denying the defendant's pre-trial motion to continue** the trial to a date more than 20 days after the defendant was charged in a true bill of indictment with habitual felon status; the assistant district attorney handling the case notified the court that the State was not going to proceed with the habitual felon charge until a later date, if at all, and after the jury verdict was announced, the State dismissed the defendant's habitual felon indictment so that defendant was sentenced solely on the substantive charges against the defendant. State v. Adams, 156 N.C. App. 318, 576 S.E.2d 377, 2003 N.C. App. LEXIS 102 (2003), cert. denied, 357 N.C. 166, 580 S.E.2d 698 (2003).

**Defendant Denied Right to Fair and Nonprejudicial Trial by Trial Judge's Conduct.** — Because the cumulative nature of the trial judge's remarks to defense counsel regarding his speech pattern, along with a fine imposed for counsel's use of the word "okay," set a tone of fear in the trial and tainted the atmosphere of the same, prejudicing defendant's rights, defendant was entitled to a new trial. State v. Wright, 172 N.C. App. 464, 616 S.E.2d 366, 2005 N.C. App. LEXIS 1797 (2005).

**Denial of Due Process by Judge's Expression of Bias.** — Judge's response of "I don't know how you treat women in Mexico, but here you don't treat them that way" to a husband's objection to an award of spousal support to his wife demonstrated an inappropriate bias against the nationality or ethnicity of a party that should play no role in the decision-making process under U.S. Const., Amend. XIV, § 1 and N.C. Const., Art. I, § 19; such a statement violated N.C. Code Jud. Conduct Canons 1, 2(A), and 3(A)(3). In re Inquiry Concerning a Judge (Badgett), 362 N.C. 482, 666 S.E.2d 743, 2008 N.C. LEXIS 808 (2008).

**Due Process Not Denied When Prosecutor Chose to Prosecute Under Substantive Crime Rather Than Criminal Contempt.** — Defendant's prosecution for failure to appear did not violate defendant's due process rights under N.C. Const., Art. I, § 19, where defendant was prosecuted under G.S. 15A-543, and defendant could have been punished for failure to appear under the criminal contempt statute, G.S. 5A-12(a); because there was evidence from which a jury could have found that defendant violated either G.S. 15A-543 or G.S. 5A-12(a), it was within the prosecutor's discretion to decide under which statute the State wished to proceed. State v. Dammons, 159 N.C. App. 284, 583 S.E.2d 606, 2003 N.C. App. LEXIS 1539 (2003), review denied, 357 N.C. 579, 589 S.E.2d 133 (2003), cert. denied, 541 U.S. 951, 124 S. Ct. 1691, 158 L. Ed. 2d 382 (2004).

**Due Process Denied When Decision of Whether Probation Should be Revoked is Delegated to Victim.** — Trial court's judgment revoking defendant's probation imposed upon his conviction for obtaining property by false pretenses violated the minimum requirements of due process because the trial court improperly abdicated its discretionary authority to determine whether probation should be revoked and, instead, delegated to the victim the authority of determining whether revocation was proper by stating that it would continue defendant on probation only if the victim agreed to that course of action. State v. Arnold, 169 N.C. App. 438, 610 S.E.2d 396, 2005 N.C. App. LEXIS 672 (2005).

**Outdoor Advertising Was Not a Fundamental Right for Purposes of Substantive Due Process.** — While the general assembly had declared that outdoor advertising was a legitimate commercial use of private property adjacent to roads and highways, such advertising did not involve a fundamental right for purposes of a substantive due process analysis of regulations governing the height of billboards. Capital Outdoor, Inc. v. Tolson, 159 N.C. App. 55, 582 S.E.2d 717, 2003 N.C. App. LEXIS 1417 (2003), cert. denied, 357 N.C. 504, 587 S.E.2d 662 (2003).

**G.S. 20-38.6(a), (f) and G.S. 20-38.7(a) do not violate substantive due process** because they are not unreasonable, arbitrary or capricious, and are substantially related to the valid object sought to be obtained; the Legislature determined that the pretrial procedures codified in G.S. 20-38.6(a), (f) and G.S. 20-38.7(a) would serve as a means to improve the safety of the motoring public of North Carolina. State v. Fowler, — N.C. App. —, 676 S.E.2d 523, 2009 N.C. App. LEXIS 832 (May 19, 2009).

**No Denial of Procedural Due Process.** — An individual, who was assessed a $50.00 civil penalty for a red light violation detected by cameras installed under the authority of G.S. 160A-300.1 and High Point, N.C., Ordinance No. 00-89, § 10-1-306, launched a procedural due process challenge to the statute and the ordinance under the Fourteenth Amendment and N.C. Const., Art. I, § 19; upon considering the merits of the claim, the court granted defendants' motions for summary judgment because the individual failed to avail himself of any of the procedural processes defendants made available and he lacked U.S. Const., Art. III, § 2 standing to challenge such processes. More fundamentally, even if the individual did have standing, the foundational premise of his claim was fatally flawed because the statute and the ordinance were clearly civil in nature. Finally, after analyzing each of the individual's ten specific contentions to determine whether the process provided was sufficient in a civil setting, the court concluded that, in each instance, due process was adequately afforded to citation recipients such as the individual. Shavitz v. City of High Point, 270 F. Supp. 2d 702, 2003 U.S. Dist. LEXIS 11839 (M.D.N.C. 2003).

Wife's due process rights were not violated by a delay in the trial proceedings or by the four month period between the the trial court's oral announcement of it final decision and the entry of judgment; the trial delay appeared to be the result of the wife's actions and there was a large amount of property at issue in the equitable distribution judgment. White v. Davis, 163 N.C. App. 21, 592 S.E.2d 265, 2004 N.C. App. LEXIS 256 (2004).

Husband, who was duly served with notice and who was originally represented by counsel in a dissolution of marriage proceeding filed by his wife, was not denied due process since he received proper notice of the hearings in the proceeding because notice was sent to the address that was given and it was the duty of the husband to ascertain the dates and the times for hearings in the proceeding. Dalgewicz v. Dalgewicz, 167 N.C. App. 412, 606 S.E.2d 164, 2004 N.C. App. LEXIS 2375 (2004).

Due process rights of a student were not violated by a 15-day suspension where the record showed that the student was given notice of the charges, an opportunity to be heard, and an opportunity to examine and cross-examine witnesses. Alexander v. Cumberland County Bd. of Educ., 171 N.C. App. 649, 615 S.E.2d 408, 2005 N.C. App. LEXIS 1366 (2005).

Widow failed to demonstrate that the superior court denied her an opportunity to be heard on her appeal of the superior court clerk's order denying her claim for an elective share because the widow had ample opportunity to be heard; due to the voluminous briefing before the superior court, along with the extensive materials already in the record, there was no basis upon which one could conclude that the widow was denied due process. Pope v. Rollins (In re Estate of Pope), — N.C. App. —, 666 S.E.2d 140, 2008 N.C. App. LEXIS 1626 (2008).

Sheriff complied with G.S. 1-339.54(2)a because he sent a condominium owner notice of an execution sale via registered mail more than 30 days prior to the sale of the property to the owner's last known address; because the owner was not located in the county, he was not entitled to have a copy of the notice served on him personally pursuant to G.S. 1-339.54(1). St. Regis of Onslow County, N.C. Owners Ass'n v. Johnson, 191 N.C. App. 516, 663 S.E.2d 908, 2008 N.C. App. LEXIS 1468 (2008).

## III. EQUAL PROTECTION.

**Principle of Equal Protection Expressly Incorporated.** — The principle of the equal protection of the law, made explicit in U.S. Const., Amend. XIV, has now been expressly incorporated in this section. S.S. Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971).

**Two-tiered Equal Protection Analysis.** — Courts employ a two-tiered scheme of analysis when an equal protection claim is made. When a governmental act classifies persons in terms of their ability to exercise a fundamental right, or when a governmental classification distinguishes between persons in terms of any right, upon some "suspect" basis, the upper tier of equal protection analysis is employed. Calling for "strict scrutiny," this standard requires the government to demonstrate that the classification is necessary to promote a compelling governmental interest. When an equal protection claim does not involve a "suspect class" or a fundamental right, the lower tier of equal protection analysis is employed. This mode of analysis merely requires that distinctions which are drawn by a challenged statute or action bear some rational relationship to a conceivable legitimate governmental interest. Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820, appeal dismissed and cert. denied, 303 N.C. 710, 283 S.E.2d 136 (1981).

**Equal Protection Extends to Persons, Not Rights.** — The equal protection clauses of the State and federal Constitutions prohibit denial of the equal protection of the laws to persons, not to rights. Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979).

**Who Are "Persons".** — A human fetus is not a "person" within the protection guaranteed by N.C. Const., Art. I, § 1 and this section. Stam v. State, 302 N.C. 357, 275 S.E.2d 439 (1981).

**One Person, One vote.** — One person, one vote principle of N.C. Const., Art. I, § 19, did not apply to judicial elections. Blankenship v. Bartlett, 184 N.C. App. 327, 646 S.E.2d 584, 2007 N.C. App. LEXIS 1452 (2007), review granted, appeal dismissed, 668 S.E.2d 24 (N.C. 2008).

**The legislature may make classifications and distinctions in the application of laws** provided they are reasonable and just and not arbitrary. Motley v. State Bd. of Barber

Exmrs., 228 N.C. 337, 45 S.E.2d 550, 175 A.L.R. 253 (1947).

Legislative bodies may make classifications for the application of regulations, provided the classifications are practicable and apply equally to all persons within a class, since the constitutional mandate proscribing discrimination requires only that there be no inequality among those within a particular group or class. State v. Trantham, 230 N.C. 641, 55 S.E.2d 198 (1949).

Legislative bodies may distinguish, select, and classify objects of legislation. It suffices if the classification is practical. They may prescribe different regulations for different classes, and discrimination as between classes is not such as to invalidate the legislative enactment. Raleigh Mobile Home Sales, Inc. v. Tomlinson, 276 N.C. 661, 174 S.E.2d 542 (1970).

A state may classify in a statute with reference to the evil to be prevented, and if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. The State may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses. Raleigh Mobile Home Sales, Inc. v. Tomlinson, 276 N.C. 661, 174 S.E.2d 542 (1970).

There is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied, that is, that the legislature must be held rigidly to the choice of regulating all or none. Raleigh Mobile Home Sales, Inc. v. Tomlinson, 276 N.C. 661, 174 S.E.2d 542 (1970).

Neither the equal protection clause of U.S. Const., Amend. XIV nor the similar language in this section takes from the State the power to classify persons or activities when there is reasonable basis for such classification and for the consequent difference in treatment under the law. Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972); A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979); Responsible Citizens v. City of Asheville, 308 N.C. 255, 302 S.E.2d 204 (1983); Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983).

**Equal protection clauses do not require perfection in respect of classifications.** In borderline cases, the legislative determination is entitled to great weight. Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983).

In the area of economics and social welfare, a state does not violate the equal protection clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. Glusman v. Trustees of Univ. of N.C., 281 N.C. 629, 190 S.E.2d 213 (1972), vacated on other grounds, 412 U.S. 947, 93 S. Ct. 2999, 37 L. Ed. 2d 999 (1973).

**But legislation may not discriminate arbitrarily,** either as between persons or groups of persons or as between activities which are prohibited and those which are permitted. Raleigh Mobile Home Sales, Inc. v. Tomlinson, 276 N.C. 661, 174 S.E.2d 542 (1970).

**To withstand an equal protection claim a statute's classification must be reasonable,** not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. North Carolina Ass'n of Licensed Detectives v. Morgan, 17 N.C. App. 701, 195 S.E.2d 357 (1973).

The traditional equal-protection test does not require the very best classification in the light of a legislative or regulatory purpose; however, it does require that such classification in relation to such purpose attain a minimum (undefined and undefinable) level of rationality. Glusman v. Trustees of Univ. of N.C., 281 N.C. 629, 190 S.E.2d 213 (1972), vacated on other grounds, 412 U.S. 947, 93 S. Ct. 2999, 37 L. Ed. 2d 999 (1973).

Legislative classifications will be upheld provided the classification is founded upon reasonable distinctions, affects all persons similarly situated or engaged in the same business without discrimination, and has some reasonable relation to the public peace, welfare and safety. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

This section requires that if a class is created there must be a reasonable basis for such classification and the consequent difference in treatment under the law. This means that the creation of the class must be reasonably related to the accomplishment of some purpose which the legislature has the power to reach. Durham Council of Blind v. Edmisten, 79 N.C. App. 156, 339 S.E.2d 84, cert. denied and appeal dismissed, 316 N.C. 552, 344 S.E.2d 5 (1986).

**Validity Depends upon Reasonable Relation to Accomplishment of Legitimate Objective.** — The validity of a specific State statute or ordinance depends upon its reasonable relation to the accomplishment of the State's legitimate objective. Raleigh Mobile Home Sales, Inc. v. Tomlinson, 276 N.C. 661, 174 S.E.2d 542 (1970).

When a special class of persons is singled out by the legislature for special treatment, there must be a reasonable relation between the classification and the object of the statute. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972); In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

The equal protection clauses of the United States Constitution and the Constitution of North Carolina require that in making classifications there be no discrimination, that is, that there be some reasonable relation between the class created and the legislative end to be obtained. Ledwell v. Berry, 39 N.C. App. 224, 249 S.E.2d 862 (1978), cert. denied, 296 N.C. 585, 254 S.E.2d 35 (1979).

**Test Is Reasonableness in Relation to Purpose and Subject Matter.** — The test required by this section is whether the difference in treatment made by the law has a reasonable basis in relation to the purpose and subject matter of the legislation. Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972); Responsible Citizens v. City of Asheville, 308 N.C. 255, 302 S.E.2d 204 (1983).

The equal protection clauses of the United States and North Carolina Constitutions impose upon law-making bodies the requirement that any legislative classification be based on differences that are reasonably related to the purposes of the act in which it is found. State v. Greenwood, 280 N.C. 651, 187 S.E.2d 8 (1972); North Carolina Ass'n of Licensed Detectives v. Morgan, 17 N.C. App. 701, 195 S.E.2d 357 (1973); In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976); Brown v. Brannon, 399 F. Supp. 133 (M.D.N.C. 1975), aff'd, 535 F.2d 1249 (4th Cir. 1976).

In the area of economics and social welfare, a statute containing a legislative classification which is rationally related to a legitimate state objective does not violate this section or the equal protection clause of U.S. Const., Amend. XIV. The traditional equal-protection test does not require the very best classification in the light of a legislative or regulatory purpose, but does require that such classification in relation to such purpose attain a minimum (undefined and undefinable) level of rationality. State v. Stanley, 79 N.C. App. 379, 339 S.E.2d 668 (1986).

**And the Legislature's Classification Will Be Presumed Valid.** — Although the reasonableness of a particular classification is a question for the court, there is a presumption that the classification is valid, because such classifications are largely matters of legislative judgment. Therefore, a court may not substitute its judgment of what is reasonable for that of the legislative body, particularly when the reasonableness of a particular classification is fairly debatable. Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983).

**Protection Against Unreasonable Discrimination Extends to Administration and Execution of Laws.** — The constitutional protection in this section against unreasonable discrimination under color of law is not limited to the enactment of legislation. It extends also to the administration and the execution of laws valid on their face. S.S. Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971); State v. Clark, 300 N.C. 116, 265 S.E.2d 204 (1980).

The provisions of the "law of the land" clause of the Constitution of North Carolina and U.S. Const., Amend. XIV afford protection against discriminatory actions of officials in administering the law. State v. Wilson, 262 N.C. 419, 137 S.E.2d 109 (1964).

**And Discriminatory Administration Is a Denial of Equal Protection.** — Even if a law itself is fair on its face and impartial in appearance, if it is applied and administered by public authority with an evil eye and an unequal hand, so as to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, this denial of equal justice is still within the prohibition of the Constitution. S.S. Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971).

Discriminatory administration of an ordinance is a denial of the equal protection of the law. S.S. Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971).

**But Mere Laxity in Enforcement Does Not Render Law Invalid.** — Mere laxity, delay or inefficiency of the police department or of the prosecutor in the enforcement of a statute or ordinance which is otherwise valid does not destroy the law or render it invalid and unenforceable. S.S. Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971).

**Nor does selective enforcement have that effect** if it has a reasonable relation to the purpose of the legislation, such as making efficient use of police manpower by concentrating upon the major sources of the criminal activity. S.S. Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971).

**Unless There Is Intentional or Purposeful Discrimination.** — Unlawful administration by state officers of a state statute which is fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless an element of intentional or purposeful discrimination is shown. Such discriminatory purpose is not presumed. S.S. Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971).

**As actions of public officials are presumed to be regular** and done in good faith. State v. Clark, 300 N.C. 116, 265 S.E.2d 204 (1980).

The good faith of the enforcing officers is presumed. S.S. Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971).

**And the burden is upon complainant to show intentional purposeful discrimination** upon which he relies. S.S. Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971).

The burden is on the challenger to show that actions as to him were unequal when compared to persons similarly situated. State v. Clark, 300 N.C. 116, 265 S.E.2d 204 (1980).

**Whole County Provisions.** — The whole county provisions of N.C. Const., Art. II, §§ 3(3) and 5(3) are interpreted consistent with federal law and reconciled with equal protection requirements under the state Constitution by requiring the formation of single-member districts in North Carolina legislative redistricting plans. The boundaries of such single-member districts, however, may not cross county lines except as outlined in the court's opinion. Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377, 2002 N.C. LEXIS 420 (2002).

**Judicial Redistricting Plan Did Not Violate Equal Protection.** — Redistricting plan for the superior courts in a county enacted pursuant to G.S. 7A-41 did not violate N.C. Const., Art. I, § 19, as the one person, one vote principle did not apply to judicial elections. Blankenship v. Bartlett, 184 N.C. App. 327, 646 S.E.2d 584, 2007 N.C. App. LEXIS 1452 (2007), review granted, appeal dismissed, 668 S.E.2d 24 (N.C. 2008).

**Single and Multi-Member Voting Districts.** — Use of both single-member and multimember districts within the same redistricting plan violates the equal protection clause of the state Constitution unless it is established that inclusion of multi-member districts advances a compelling state interest; hence the trial court would be directed on remand of action challenging 2001 legislative redistricting plans to afford the opportunity to establish, at an evidentiary hearing, that the use of such districts advances a compelling state interest within the context of a specific, proposed remedial plan. Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377, 2002 N.C. LEXIS 420 (2002).

While instructive as to how multi-member districts may be used compatibly with "one-person, one-vote" principles, N.C. Const., Art. II, §§ 3(3) and 5(3) are not affirmative constitutional mandates and do not authorize use of both single-member and multi-member districts in a manner violative of the fundamental right of each North Carolinian to substantially equal voting power. Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377, 2002 N.C. LEXIS 420 (2002).

**Punitive Damages Cap Upheld.** — Section 1D-25, placing a cap on an award of punitive damages, did not treat similarly situated persons differently without compelling reason or rational justification; no fundamental right is involved and the statute makes no mention of suspect classifications, subjecting it to rational basis review, and it bears a rational relationship to a legitimate governmental interest in the state's economic development. Rhyne v. K-Mart Corp., 149 N.C. App. 672, 562 S.E.2d 82, 2002 N.C. App. LEXIS 316 (2002), aff'd, 358 N.C. 160, 594 S.E.2d 1 (2004).

Because the limitation on punitive damages contained in G.S.1D-25 bears some rational relationship to several legitimate governmental interests, G.S. 1D-25 does not violate principles of due process and equal protection as guaranteed by N.C. Const., Art. I, § 19. Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004).

**The defendant/highway patrol was not entitled to assert the doctrine of sovereign immunity** as a defense to plaintiffs' claim that the highway patrol violated the decedent's constitutional rights by promoting or knowing about "the I-Troop's pattern and practice of racially-influenced traffic stops of Black motorists" because this claim alleged a violation of the decedent's right to equal protection under the North Carolina Constitution. Estate of Fennell v. Stephenson, 37 N.C. App. 430, 528 S.E.2d 911, 2000 N.C. App. LEXIS 428 (2000).

**Disparate Application of Anti-subrogation Rule Upheld.** — Anti-subrogation rule served a legitimate purpose, and the existence of a prior superior court decision restraining the N.C. Department of Insurance from enforcing anti-subrogation rule against one insurer alone constituted a rational basis for the department's disparate treatment of similarly situated insurers; hence, no equal protection violation existed. In re Ruling by N. C. Comm'r of Ins., 134 N.C. App. 22, 517 S.E.2d 134, 1999 N.C. App. LEXIS 665 (1999), cert. denied, appeal dismissed, 351 N.C. 105, 540 S.E.2d 356 (1999).

**Rejection of Low Bid Not Violative of Equal Protection.** — The county's rejection of the low bid for operation of a county landfill did not violate the low bidder's equal protection rights, where the county had valid concerns about the low bidder's financial strength and his competence to operate the landfill, and the county's determination to choose a qualified operator was a legitimate government purpose. City-Wide Asphalt Paving, Inc. v. Alamance County, 132 N.C. App. 347, 513 S.E.2d 335 (1999).

**It Is Not Sufficient to Show That Other Violators Have Not Been Prosecuted.** — One who violates a law which is valid on its face does not bring himself within the protection of the discriminatory administration rule merely by showing that numerous other persons have also violated the law and have not been arrested and prosecuted therefor. S.S. Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971).

**Equal protection clause was not violated when court applied felony murder rule** and punished defendant more severely by sentencing him to death because more victims were harmed as authorized by G.S. 15A-1340.16(d)(8) and G.S. 15A-2000(e)(11). State v. Jones, 133 N.C. App. 448, 516 S.E.2d 405

(1999), aff'd in part, rev'd in part on other grounds, and remanded, 353 N.C. 159, 538 S.E.2d 917 (2000).

**The ownership distinctions of §§ 105-277.2(4)b and 105-277.2(5a)** satisfy the equal protection requirements of the State and federal Constitutions. In re Consol. Appeals of Certain Timber Cos., 98 N.C. App. 412, 391 S.E.2d 503 (1990).

**Test to Determine Blood Alcohol Content.** — All individuals arrested for driving while impaired who are tested under the model 900 breathalyzer are given the same initial test to determine blood alcohol content. The regulations merely treat the same group of people in a different way depending on the results of the first test. This classification is not of the type that can be considered a denial of equal protection. State v. Garvick, 98 N.C. App. 556, 392 S.E.2d 115 (1990).

**Person who is not included in class against which there has been a discrimination cannot take advantage of the discrimination** by pleading that the proceeding constitutes a violation of the equal protection guaranteed by U.S. Const., Amend. XIV and by this section. Twin City Apts., Inc. v. Landrum, 45 N.C. App. 490, 263 S.E.2d 323 (1980).

**Review of Annexation Where Violation of Fundamental Right Not Alleged.** — In a case alleging that annexation under a local act was arbitrary and capricious in violation of the equal protection clause, but not contending that the annexation violated a fundamental right or created a suspect class, a less heightened, lower tier avenue of review was available. Piedmont Ford Truck Sales, Inc. v. City of Greensboro, 90 N.C. App. 692, 370 S.E.2d 262 (1988), rev'd on other grounds, 324 N.C. 499, 380 S.E.2d 107 (1989).

**The ban on the use or possession of tobacco products by students at school** is a valid exercise of the authority delegated to the various boards of education by the legislature, and does not violate the guarantee of equal protection contained in U.S. Const., Amend. XIV and this section. Craig v. Buncombe County Bd. of Educ., 80 N.C. App. 683, 343 S.E.2d 222, appeal dismissed, 318 N.C. 281, 348 S.E.2d 138 (1986).

**Landowners in Drainage District Deprived of Vote.** — Where some landowners who lived in a drainage district could vote for the clerk who appointed the commissioners of the drainage district and some landowners could not, the defendant nonvoters had been deprived of a fundamental right; furthermore, plaintiff drainage district failed to show that the classification of voters in this case was necessary to promote a compelling governmental interest; therefore, defendants were deprived equal protection of the laws in violation of this section. Northampton County Drainage Dist. Number One v. Bailey, 326 N.C. 742, 392 S.E.2d 352 (1990).

**Restrictions on Funding Medically Necessary Abortions for Indigent Women.** — The action of the General Assembly in placing severe restrictions on the funding of medically necessary abortions for indigent women is valid and does not violate Article I, Section 1; Article 1, Section 19; or Article XI, Section 4 of the Constitution of North Carolina. Rosie J. v. North Carolina Dep't of Human Resources, 347 N.C. 247, 491 S.E.2d 535 (1997).

**No Equal Protection Violation.** — An individual, who was assessed a $ 50.00 civil penalty for a red light violation detected by cameras installed under the authority of G.S. 160A-300.1 and High Point, N.C., Ordinance No. 00-89, § 10-1-306, launched an equal protection challenge to the statute and the ordinance under the Fourteenth Amendment and N.C. Const., Art. I, § 19; upon considering the merits of the claim, the court granted defendants' motions for summary judgment because the individual failed to identify any fundamental right allegedly abridged by the statute or the ordinance or to allege membership in any suspect class; additionally, the individual failed to surmount the formidable presumption of validity bestowed upon the statute and the ordinance by the rational basis review standard. Shavitz v. City of High Point, 270 F. Supp. 2d 702, 2003 U.S. Dist. LEXIS 11839 (M.D.N.C. 2003).

Denial of a city's summary judgment motion on a pedestrian's claim that the city violated N.C. Const., Art. I, § 19 by asserting the defense of governmental immunity to her claims was error because the uncontradicted evidence established that claims against city were never denied on basis of sovereign immunity, but paid or denied on basis of merits. Jones v. City of Durham, 183 N.C. App. 57, 643 S.E.2d 631, 2007 N.C. App. LEXIS 841 (2007).

G.S. 20-38.6(a), (f) and G.S. 20-38.7(a) do not violate the Equal Protection Clause of the United States Constitution or of the North Carolina Constitution because the Legislature's objective to improve the safety of the motoring public of North Carolina is a legitimate objective and the procedures established by G.S. 20-38.6(a), (f), and G.S. 20-38.7(a) are rationally related to that objective; no classification between different groups has been created, but all defendants charged with an implied-consent offense appearing in district court will be subject to the same procedural requirements established by G.S. 20-38.6(a), (f) and G.S. 20-38.7(a), State v. Fowler, — N.C. App. —, 676 S.E.2d 523, 2009 N.C. App. LEXIS 832 (May 19, 2009).

Temporary state employees who alleged that the State of North Carolina wrongly classified them and illegally denied them the benefits provided to similarly-situated permanent or time-limited permanent State employees failed to state a cause of action under the Equal Protection Clause. Sanders v. State Personnel Comm'n, — N.C. App. —, 677 S.E.2d 182, 2009 N.C. App. LEXIS 687 (2009).

Plaintiffs' did not sufficiently alleged that they were treated differently from other similarly situated persons; as a practical matter, it would be exceedingly difficult for a plaintiff to show disparate treatment of similarly situated claimants absent evidence of reliance on an inherently suspect criteria. The county school board's allegedly selective use of the immunity defense, without more, did not meet the requirements necessary to survive a motion to dismiss; alternatively, the board's discretion to pay certain claims and not others was rationally related to a government interest and plaintiffs failed to allege that the board's treatment of plaintiffs' claim was the result of intentional or purposeful discrimination. Frye v. Brunswick County Bd. of Educ., 612 F. Supp. 2d 694, 2009 U.S. Dist. LEXIS 18084 (E.D.N.C. 2009).

**Due Process and Equal Protection Suit Barred by Res Judicata.** — Where a student allegedly was treated differently than three boys who assaulted the student, the student's due process and equal protection suit against a county board of education was barred by res judicata because the dismissal of the student's prior suit on grounds of sovereign immunity was a final judgment on the merits for purposes of res judicata; there was identity of the causes of action since the student could have amended the complaint to assert the constitutional claims upon the filing of the board's answer. Herring v. Winston-Salem/Forsyth County Bd. of Educ., 188 N.C. App. 441, 656 S.E.2d 307, 2008 N.C. App. LEXIS 231 (2008).

**Illustrative Cases.** — Summary judgment was inappropriate on plaintiffs' equal protection claim which alleged that the defendants violated this section by asserting sovereign immunity in their case while customarily waiving it for similarly situated individuals. The city failed to offer an explanation as to how its differing treatment of tort claimants was based on differences between the claimants and how these differences were rationally related to a legitimate governmental objective. Dobrowolska v. Wall, 138 N.C. App. 1, 530 S.E.2d 590, 2000 N.C. App. LEXIS 539 (2000).

Sovereign immunity did not protect the county from a retiree's suit brought directly under N.C. Const., Art I, § 19, where the claim was caused by the county's official policy in retroactively changing the time of service required to receive retirement benefits. Peverall v. County of Alamance, 154 N.C. App. 426, 573 S.E.2d 517, 2002 N.C. App. LEXIS 1477 (2002), cert. denied, 356 N.C. 676, 577 S.E.2d 632 (2003).

Teachers' equal protection allegations against the school board, even when assumed correct and construed most favorably, merely expressed disconcert with actions wholly consistent with the school board's authority under state law; because the teachers failed to allege an essential element of an equal protection claim — namely, arbitrary or irrational state action — their equal protection claims were properly dismissed. Lea v. Grier, 156 N.C. App. 503, 577 S.E.2d 411, 2003 N.C. App. LEXIS 238 (2003).

Chancellor and the vice-chancellor's motion to dismiss the professor's state claims under N.C. Const., Art. I, § 19 on the basis that their adjudication was barred by the Eleventh Amendment was denied because sovereign immunity did not apply to North Carolina state constitutional claims; thus, the chancellor and the vice-chancellor's removal of the claims to federal court waived their Eleventh Amendment immunity. Azam v. Martin, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 20874 (M.D.N.C. Nov. 7, 2003).

City was denied summary judgment on an employee's equal protection claims brought pursuant to U.S. Const., Amend. XIV and N.C. Const., Art. I, § 19, where the employee had raised issues of fact as to whether race was a motivating factor in the decision to terminate her from the police force and the termination was approved by the city manager, who was vested with final decision-making authority. Disher v. Weaver, 308 F. Supp. 2d 614, 2004 U.S. Dist. LEXIS 3849 (M.D.N.C. 2004).

Even though a student failed to preserve an equal protection challenge to a suspension by failing to assign error or present authority, the argument was meritless at any rate under arbitrary and capricious review because there was a gender-neutral reason for a longer suspension; prior incidents of "shanking" at a high school did not result in the exposure of buttocks or genitalia. Alexander v. Cumberland County Bd. of Educ., 171 N.C. App. 649, 615 S.E.2d 408, 2005 N.C. App. LEXIS 1366 (2005).

Trial court properly dismissed appeal by hospital joint venture and a town from denial of a certificate of need to construct a new hospital under the exemption provisions of G.S. 131E-184(a); the equal protection claim under N.C. Const., Art. I, § 19 and U.S. Const., Amend. XIV was properly dismissed as it failed to state a claim upon which relief could be granted in that it failed to allege the lack of a rational basis. Good Hope Hosp., Inc. v. N.C. HHS, Div. of Facility Servs., 174 N.C. App. 266, 620 S.E.2d 873, 2005 N.C. App. LEXIS 2399 (2005).

## IV. RIGHTS OF DEFENDANTS.

### A. In General.

**Due process of law secures rights to a defendant.** State v. Patton, 260 N.C. 359, 132 S.E.2d 891 (1963), cert. denied, 376 U.S. 956, 84 S. Ct. 977, 11 L. Ed. 2d 974 (1964).

**But it does not preclude the rights of public justice.** State v. Patton, 260 N.C. 359, 132 S.E.2d 891 (1963), cert. denied, 376 U.S. 956, 84 S. Ct. 977, 11 L. Ed. 2d 974 (1964).

**The discretion of the trial judge** given him over the trial of a cause is rarely interfered with, though his action may be set aside for such gross abuse as would invade the legal rights to the prejudice of the appealing party. State v. Sauls, 190 N.C. 810, 130 S.E. 848 (1925).

**Judge Not Required to Aid in Presentation of Defense.** — A trial judge is not required by either the federal or State Constitutions to aid a defendant on trial before him in the presentation of his defense. State v. Morris, 275 N.C. 50, 165 S.E.2d 245 (1969).

**Judge's Remarks on Failure to Accept Plea Agreement.** — Defendant's right to a jury trial was not violated at sentencing despite the trial judge's remarks about defendant's rejection of the plea offer because the judge focused on defendant's submission of false testimony and "fabricated" evidence in justifying the sentence imposed. State v. Tice, 191 N.C. App. 506, 664 S.E.2d 368, 2008 N.C. App. LEXIS 1507 (2008).

**Judge's Comment Did Not Deprive Defendant of Fair Trial.** — Trial judge's remarks, prompting the prosecutor to elicit an identification from the victim, did not deprive defendant of a fair trial; by raising the issue while the victim was still on the stand, the trial court avoided inconvenience to the victim and the waste of judicial resources in having the State later seek to recall the victim or reopen its case. State v. Ryder, — N.C. App. —, 674 S.E.2d 805, 2009 N.C. App. LEXIS 457 (2009).

**Criminal Statute or Ordinance Must Be Definite.** — A criminal statute or ordinance must be sufficiently definite to inform citizens of common intelligence of the particular acts which are forbidden. State v. Sanders, 37 N.C. App. 53, 245 S.E.2d 397 (1978).

**15-Year Delay in Charging Sexual Assault.** — Defendant's conviction for sexual offense in the second degree and rape in the second degree were upheld on appeal, because there was no violation of defendant's due process rights due to a 15-year delay in the victim reporting the crimes and defendant being charged; no statute of limitations exists for the crimes of rape, sex offense, or indecent liberties with a minor. State v. Stanford, 169 N.C. App. 214, 609 S.E.2d 468, 2005 N.C. App. LEXIS 529 (2005).

**Discretion to Prosecute for Capital Offense.** — Defendant's argument that he was denied due process because the district attorney has the absolute discretion to charge and prosecute an accused for a capital offense or to bring him to trial upon a lesser included offense has been considered and rejected in a number of cases. State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

**The presumptions of unlawfulness and malice** arising from an intentional assault with a deadly weapon proximately resulting in death are constitutional. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

**Use of Short-form Indictment.** — Court of appeals rejected defendant's argument that the trial court violated his rights under U.S. Const., Amends. V, VI, and XIV and N.C. Const., Art. I, §§ 19, 22, and 23 by entering a judgment convicting him of felony murder and sentencing him to life imprisonment without parole on the basis of a short-form indictment. State v. Coleman, 161 N.C. App. 224, 587 S.E.2d 889, 2003 N.C. App. LEXIS 2039 (2003).

Court of appeals rejected defendant's argument that the trial court violated his rights under U.S. Const., Amends. V, VI, and XIV and N.C. Const., Art. I, §§ 19, 22, and 23, by entering a judgment convicting him of first degree rape and first degree sex offense on the basis of a short-form indictment. State v. Randle, 167 N.C. App. 547, 605 S.E.2d 692, 2004 N.C. App. LEXIS 2381 (2004).

**Denial of post-indictment motions for probable cause hearing.** — In a prosecution for first-degree murder and armed robbery, the denial of defendants' post-indictment motions for a probable cause hearing did not violate G.S. 15A-606(a) or deprive defendants of equal protection and due process of law. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

**Denial of pre-trial disclosure of evidence under § 8C-1, Rule 404(b) did not deprive defendant of a fair trial** in violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, §§ 19 and 23 of the North Carolina Constitution. State v. Parker, 2000 N.C. App. LEXIS 1107 (N.C. App. Oct. 3, 2000).

**Delays in Bond Hearing and Release Held Constitutional.** — Neither the delay in receiving a bond hearing nor the additional time defendant was required to remain in custody after the hearing violated the defendant's due process rights or G.S. 15A-534.1, where the defendant was taken into custody in the evening, brought before a judge the next day, and then detained another five hours before being released on a $1,000 unsecured bond. There was no evidence that an arbitrary limit was placed on the time defendant would be held in detention before seeing a judge; defendant was brought before a judge as soon as one was available; and the additional five-hour detention was not unreasonable. State v. Gilbert, 139 N.C. App. 657, 535 S.E.2d 94, 2000 N.C. App. LEXIS 1043 (2000).

**No Right to Same Judge for Pretrial and Trial.** — There is no right to have the same judge hear all pretrial motions and other procedural matters as well as preside over the trial itself, whether the trial is complicated or straightforward. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), sentence vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990), in light of State v. Peoples, 131 N.C. 784, 42 S.E. 814 (1902).

**No Right to Inspect Files of State Bureau of Investigation.** — Where there was no contention that anything in the files of the State Bureau of Investigation was admitted into evidence and the record showed that no member of the Bureau testified during the trial, defendants' contention that they were entitled to an inspection of the files of the Bureau in regard to its investigation of the case was untenable, and denial of their petition for such inspection did not violate any of their rights under this section, or under U.S. Const., Amends. V, VI, VII and XIV. State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334, cert. denied, 377 U.S. 978, 84 S. Ct. 1884, 12 L. Ed. 2d 747 (1964).

**Fact that evidence was obtained by police officers outside of their territorial jurisdiction** while conducting an undercover investigation was not fundamentally unfair to defendant. State v. Afflerback, 46 N.C. App. 344, 264 S.E.2d 784 (1980).

**Promise by Police Officer.** — Police officer's promise not to prosecute the defendant as an habitual offender was just as capable of implicating the defendant's constitutional rights as a promise made by a prosecutor, once the right to counsel had attached or custodial interrogation begun, and the protections of due process necessarily arose. State v. Sturgill, 121 N.C. App. 629, 469 S.E.2d 557 (1996).

**Defendant's right to prepare a defense was violated** when the trial court, after ordering the State to turn over test-fired bullets and underlying data examinations for a defense ballistics examination, upon the State's revelation that it had lost the original shells, refused to require the State to retest the weapon in question and allowed the State's ballistics expert to testify. State v. Canady, 355 N.C. 242, 559 S.E.2d 762, 2002 N.C. LEXIS 176 (2002).

Defendant's statutory sexual offense conviction was reversed and he was granted a new trial because the sealed portion of a department of social services file subpoenaed by defendant provided an alternative explanation for the victim's abuse; the file showed that: (1) the victim's brother had a history of violence, (2) the mother had left the victim alone with the brother, (3) the victim had lied in the past in meetings with a social worker, (4) the mother believed that she might have caused one of the victim's injuries, and (5) the mother believed that it was possible that the brother had sexually abused the victim. State v. Johnson, 165 N.C. App. 854, 599 S.E.2d 599, 2004 N.C. App. LEXIS 1518 (2004).

**Destruction of Evidence.** — Whether destruction of physical evidence by the State infringes upon accused's rights depends upon circumstances in each case. State v. Anderson, 57 N.C. App. 602, 292 S.E.2d 163, cert. denied, 306 N.C. 559, 294 S.E.2d 372 (1982).

Destruction of marijuana by State for lack of storage facilities, where State made random samples, photographs and a copy of the laboratory report available to defendants, did not violate defendants' rights of confrontation under N.C. Const., Art. I, § 23, nor infringe defendants' due process rights under the federal and State Constitutions. State v. Anderson, 57 N.C. App. 602, 292 S.E.2d 163, cert. denied, 306 N.C. 559, 294 S.E.2d 372 (1982).

Although evidence seized from defendant's home was missing at the time of trial, defendant was not denied due process where there was no showing of bad faith or willful intent to destroy the evidence on the part of any law enforcement officer. State v. Hunt, 345 N.C. 720, 483 S.E.2d 417 (1997).

**Inadvertent Destruction of Evidence.** — Defendant's rights were not violated by inadvertent destruction of rape kit by police and there was no showing of bad faith on the part of the police where there was no reason for the police to believe the rape kit had any exculpatory value at the time of its destruction. State v. Banks, 125 N.C. App. 681, 482 S.E.2d 41 (1997), aff'd, 347 N.C. 390, 493 S.E.2d 58 (1997), cert. denied, 523 U.S. 1128, 118 S. Ct. 1817, 140 L. Ed. 2d 955 (1998).

**Equal Access to Criminal Records of Jurors.** — An indigent defendant's lack of access to the Police Information Network (PIN) did not deny the defendant equal access to information in violation of this section of the North Carolina Constitution, where the court suggested alternative means to obtaining such information on jurors, and the defendant's counsel did not subsequently object to the trial court's action or move for funds with which the defense could run its own criminal record checks. State v. Smith, 352 N.C. 531, 532 S.E.2d 773, 2000 N.C. LEXIS 617 (2000), cert. denied, 532 U.S. 949, 121 S. Ct. 1419, 149 L. Ed. 2d 360 (2001).

**The unsupported testimony of an accomplice is sufficient to support a convic-**

**tion** if it satisfies a jury of defendant's guilt beyond a reasonable doubt. State v. Partlow, 272 N.C. 60, 157 S.E.2d 688 (1967).

**The fact that the prosecuting attorney reads the charges** or fairly summarizes them to the defendant before the jury is not a violation of defendant's right to due process and equal protection as required by the Constitutions of this State and the United States. State v. Carter, 30 N.C. App. 59, 226 S.E.2d 179, appeal dismissed and cert. denied, 290 N.C. 664, 228 S.E.2d 455 (1976).

**Prosecutor's Statements.** — The defendant constitutional rights under Article I, Sections 19, 23, and 27 of the North Carolina Constitution were not violated by the prosecution's argument in opposition to the "catchall" mitigating circumstance of G.S. 15A-2000(f) that the jury should not give any mitigating value to the fact that his accomplice was not sentenced to death where the prosecution did not imply that the accomplice's sentence could be treated as a nonstatutory aggravating circumstance. State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1, 2000 N.C. LEXIS 352 (2000), cert. denied, 531 U.S. 1019, 121 S. Ct. 582, 148 L. Ed. 2d 498 (2000).

Defendant was not entitled to a new trial due to the State's improper closing argument which was sufficiently close to making an association between defendant and a wild animal to lead to such an inference, including a statement that "he who hunts with the pack is responsible for the kill," multiple references to hunting on the African plain when defendant was an African-American, and references to an accomplice as an "alpha male" and to defendant as a follower in the pack, as: (1) the State did not misstate the evidence or the law in making its argument, (2) the trial court instructed the jury that closing arguments were not evidence, (3) there was an abundance of evidence, both physical and testimonial, that defendant was guilty of the crimes charged, and (4) although improper, the State's comments did not deny defendant due process. State v. Sims, 161 N.C. App. 183, 588 S.E.2d 55, 2003 N.C. App. LEXIS 2044 (2003).

**Jury's Consideration of Date Charged in Indictment.** — In a prosecution for rape upon an indictment which alleged that the crime occurred on March 24, 1978, defendant was not denied a fair trial because of the court's failure to limit the jury's consideration to the specific date charged in the indictment, where a contextual reading of the record made it clear that the jury's consideration of the crime was restricted to defendant's actions on or about March 24, 1978, the record revealed nothing indicating that defendant was surprised or hampered by any attempt of the State to alter the date charged in the bill of indictment, and defendant squarely met the State's evidence concerning his actions on or about March 24, 1978. State v. Summitt, 301 N.C. 591, 273 S.E.2d 425, cert. denied, 451 U.S. 970, 101 S. Ct. 2048, 68 L. Ed. 2d 349 (1981).

**Jury Instructions.** — Defendant was not deprived of his constitutional rights where no conflict existed between the "Issues and Recommendation as to Punishment" form and the oral instructions given by the trial court. State v. Peterson, 350 N.C. 518, 516 S.E.2d 131, 1999 N.C. App. LEXIS 419 (1999), cert. denied, 528 U.S. 1164, 120 S. Ct. 1181, 145 L. Ed. 2d 1087 (2000).

Jury instruction on reasonable doubt was not improper in including the following language: "A reasonable doubt is not a vain doubt; it's not a fanciful doubt; it's not proof beyond all doubt; it's not proof beyond a shadow of a doubt. There are few things in human existence we can prove beyond all doubt and a shadow of a doubt." State v. Burke, 185 N.C. App. 115, 648 S.E.2d 256, 2007 N.C. App. LEXIS 1738 (2007).

**Pecuniary Gain Instruction Not Violative of Constitutional Rights.** — Jury instruction regarding capital felony committed for pecuniary gain to support submission of aggravating circumstance under G.S. 15A-2000(e)(6) did not violate defendant's due process and fair trial rights under this section and N.C. Const., Art. I, § 23; even though gun may have been intended for his personal use, it had pecuniary value. State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

**Setting Aside of Judgment on Negotiated Plea Held Error.** — Where negotiated plea had been adjudicated and sentence had been imposed, no valid reason had been offered by the State to set aside that plea and adjudication, and defendant could not again be tried for the charges which underlied the indictments without twice being placed in jeopardy, trial judge's setting aside of the judgment which had been entered on the negotiated plea agreement was error. State v. Johnson, 95 N.C. App. 757, 383 S.E.2d 692 (1989).

**Reservation of Ruling on Motion to Dismiss.** — When defendants moved to dismiss charges at the close of all the evidence, a trial court's reservation of a ruling on defendants' motions, which was contrary to G.S. 15A-1227(c), requiring the court to rule immediately, did not create reversible error or violate defendants' rights under U.S. Const., Amends. V and XIV, or N.C. Const., Art. I, § 19, because no prejudice was shown, as required by G.S. 15A-1443; it was more likely that the trial court would have denied the motions had the court not deferred the court's ruling, and the evidence was sufficient to withstand the motions to dismiss. State v. Hernandez, 188 N.C. App.

193, 655 S.E.2d 426, 2008 N.C. App. LEXIS 76 (2008).

**Transcript of District Court Proceedings.** — Denial of a free transcript of district court proceedings to an indigent defendant does not violate any constitutional provisions. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

State's de novo procedure does not require that a defendant purchase and provide the superior court with a transcript of the district court proceedings in order to secure full appellate review. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

**Transcript of Separate and Distinct Proceeding Against Different Defendants.** — Denial of defendant's request for a transcript of a separate and distinct proceeding with a different jury and different defendants did not constitute a violation of defendant's due process and equal protection rights, because in the absence of compelling evidence of the need for a transcript of a separate proceeding to afford defendant adequate tools for his defense, and no alternative means of obtaining such information, the State should not be required to furnish such a transcript. State v. McCullough, 50 N.C. App. 184, 272 S.E.2d 613 (1980).

**Acquittal of one coprincipal does not bar convictions of the other.** State v. Taylor, 337 N.C. 597, 447 S.E.2d 360 (1994).

**Plea of Guilty to Offense Which Defendant Not Formally Accused of Committing.** — Sentencing of petitioner, who had been indicted for a violation of former G.S. 14-26 (carnal knowledge of female virgins between 12 and 16 years of age), to imprisonment for a term of not less than 12 nor more than 15 years upon his plea of guilty to a violation of former G.S. 14-22 (assault with intent to commit rape), when there was no formal and sufficient accusation against him for the offense to which he pleaded guilty, was a nullity, and violated petitioner's rights as guaranteed by this section and by U.S. Const., Amend. XIV, and would be vacated in post-conviction proceedings. McClure v. State, 267 N.C. 212, 148 S.E.2d 15 (1966).

**Acquittal on Basis of Insanity.** — A verdict of not guilty due to insanity constitutes a full acquittal, and one thus acquitted is entitled to the same protection and constitutional rights as if he had been acquitted upon any other ground. In re Tew, 280 N.C. 612, 187 S.E.2d 13 (1972), holding the restoration to sanity procedure of former § 122-86 unconstitutional as violative of due process.

**Statement of Defendant at Sentencing Hearing.** — This section, while permitting a defendant to speak at sentencing hearing, does not require the trial court to personally address the defendant and ask him if he wishes to make a statement in his own behalf. State v. McRae, 70 N.C. App. 779, 320 S.E.2d 914 (1984), cert. denied, 313 N.C. 175, 326 S.E.2d 35 (1985).

**Showing Required of Defendant Deprived of Right to Appeal.** — When a defendant has been deprived of his right to a complete and effective appeal, he need not demonstrate that he was prejudiced or that he has arguable grounds for a successful appeal; thus, in determining whether the defendant's constitutional rights have been violated, the court should not examine the merits of the issues to be raised in a belated appeal. Galloway v. Stephenson, 510 F. Supp. 840 (M.D.N.C. 1981).

**Remedy When Defendant Is Denied Right of Appeal.** — When a petitioner has been unconstitutionally denied his appeal, the deficit may be fully rectified should the State grant a belated appeal, and nothing more will be necessary to correct the constitutional violation; however, should the State be unable to secure for petitioner a belated appeal, it could, nevertheless, also correct the violation by vacating the conviction and granting petitioner another trial and appeal. Galloway v. Stephenson, 510 F. Supp. 840 (M.D.N.C. 1981).

**Injunctive Relief Against Enforcement of Ordinance by Criminal Prosecution.** — Nothing else appearing, the enforcement of an ordinance by the criminal prosecution of those who violate it will not be enjoined in a suit brought by an acknowledged violator, whose contention is that the ordinance is invalid or that it is administered or enforced in a discriminatory manner in violation of the equal protection of the laws. His right to present this defense at his trial on the criminal charge, or to maintain a civil action for damages, constitutes an adequate remedy at law. Where, however, a plaintiff's legitimate business is threatened with destruction, through an announced purpose of making repeated arrests of his employees or customers and charging them with the violation of an allegedly invalid law, a suit for injunctive relief is an appropriate procedure for testing the equal protection constitutionality of the law or of the contemplated enforcement program. S.S. Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971).

**The fact that a justice's compensation was fixed upon a fee basis,** which he would receive only in the event of conviction, held not to result in depriving the defendant of trial under due process of law. In re Steele, 220 N.C. 685, 18 S.E.2d 132, cert. denied, 316 U.S. 686, 62 S. Ct. 1275, 86 L. Ed. 1758 (1942).

**Judge's announcement of his ruling in open court could not reasonably be characterized as a hearing,** much less one at which defendant's presence was required, where judge simply took a final step in the process of deciding whether to release any part of defendant's prison records to the prosecution and announced his decision from the bench. State v. Rich, 346 N.C. 50, 484 S.E.2d 394 (1997), cert. denied, 522 U.S. 1002, 118 S. Ct. 573, 139 L. Ed. 2d 412 (1997).

**A defendant cannot be separately convicted for both first degree kidnapping and the underlying sexual assault** under G.S. 14-39(b) without violating both the U.S. Constitution and this section. State v. White, 127 N.C. App. 565, 492 S.E.2d 48 (1997).

**Single Comprehensive Mitigating Circumstances Instruction Allowed in Murder Trial.** — The trial court did not err by denying defendant's request for separate instructions on each of his three alleged mental impairments under G.S. 15A-2000(f)(6) or by giving a single instruction combining all of the mental impairments into a single mitigating circumstance. The trial court's instruction specifically referred to each of the alleged mental disorders—his "personality disorder," "borderline range of intelligence," and "long-term, chronic and severe abuse of crack-cocaine at and around the time of the offenses"—and instructed the jury to consider whether one or all of them impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the law. State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1, 2000 N.C. LEXIS 352 (2000), cert. denied, 531 U.S. 1019, 121 S. Ct. 582, 148 L. Ed. 2d 498 (2000).

**Executive Clemency.** — To the extent that due process rights apply to clemency procedures in North Carolina, they extend no further than the minimal due process rights required by Woodard; therefore, state constitutional claims that attack the governor's exercise of clemency power are not reviewable beyond the minimal safeguards applied to state clemency procedures by Woodard. Bacon v. Lee, 353 N.C. 696, 549 S.E.2d 840, 2001 N.C. LEXIS 831 (2001).

### B. Composition of Juries.

**Representation on juries in proportion to racial population is not required.** State v. Wilson, 262 N.C. 419, 137 S.E.2d 109 (1964); State v. Yoes, 271 N.C. 616, 157 S.E.2d 386 (1967); State v. Wright, 274 N.C. 380, 163 S.E.2d 897 (1968).

A defendant is not entitled to demand a proportionate number of his race on the jury which tries him nor on the venire from which petit jurors are drawn. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

**Petit juries must be drawn from a source fairly representative of the community;** however, petit juries actually chosen need not mirror the community nor reflect the various distinctive groups in the population. State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989), cert. denied, 496 U.S. 905, 110 S. Ct. 2587, 110 L. Ed. 2d 268 (1990).

**A defendant has no right to be tried by a jury containing members of his own race** or even to have representatives of his own race serve on the jury. State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976); State v. Alford, 289 N.C. 372, 222 S.E.2d 222; 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976); State v. Foddrell, 291 N.C. 546, 231 S.E.2d 618 (1977).

In the absence of a contention that blacks were systematically and arbitrarily excluded from the jury pool, unless there is systematic and arbitrary exclusion, then a defendant has no right to be indicted or tried by a jury of his own race or even to have a representative of his race on the jury. State v. Pearson, 32 N.C. App. 213, 231 S.E.2d 279 (1977).

**But Defendant Has Right to Jury from Which Members of His Race Not Systematically Excluded.** — A citizen has no right to insist that he be indicted or tried by juries composed of persons of his own race, nor to have a person of his own race on the juries which indict and try him. But he has the right to be indicted and tried by juries from which persons of his race have not been systematically excluded. State v. Wilson, 262 N.C. 419, 137 S.E.2d 109 (1964); State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

It is not the right of any individual to be tried or indicted by a jury of his own race, or to have a representative of any particular race on the jury. It is his right to be tried by a competent jury from which members of his race have not been unlawfully excluded. State v. Yoes, 271 N.C. 616, 157 S.E.2d 386 (1967).

Defendant has the right to be tried by a jury from which members of his own race have not been systematically and arbitrarily excluded. State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976); State v. Alford, 289 N.C. 372, 222 S.E.2d 222; 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976); State v. Pearson, 32 N.C. App. 213, 231 S.E.2d 279 (1977); State v. Foddrell, 291 N.C. 546, 231 S.E.2d 618 (1977).

**Or His Conviction Will Be Invalid.** — Conviction based on the indictment of a grand jury or the verdict of a petit jury from which members of defendant's race were excluded by reason of their race cannot stand. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

**To establish a prima facie case of systematic racial exclusion,** defendants are generally required to produce not only statistical evidence establishing that blacks were underrepresented on the jury, but also evidence that the selection procedure itself was not racially neutral, or that for a substantial period in the past relatively few blacks have served on the juries of the county notwithstanding a substantial black population therein, or both. State v. Foddrell, 291 N.C. 546, 231 S.E.2d 618 (1977).

**Denial Does Not Overcome Prima Facie Discrimination.** — The mere denial, by officials charged with the duty of listing and summoning jurors, of intentional, arbitrary or systematic discrimination on the ground of race is not sufficient to overcome a prima facie case of racial discrimination. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

**Selection of Grand Jury Foreman by Racially Neutral Standard.** — A method of selecting a grand jury foreman that meets the racially neutral standard must ensure that all grand jurors are considered by the presiding judge for his selection and that his selection be made on a racially neutral basis. State v. Cofield, 324 N.C. 452, 379 S.E.2d 834 (1989).

**Prima Facie Case of Racial Discrimination in Selection of Grand Jury Foreman.** — A black defendant may make out a prima facie case of racial discrimination in the grand jury foreman's selection by showing either (1) that the selection procedure itself was not racially neutral, or (2) that for a substantial period in the past, relatively few blacks have served in the position of foreman even though a substantial number have been selected to serve as members of grand juries; the State may rebut such a prima facie case on remand by offering evidence that the process used in selecting the grand jury foreman was in fact racially neutral. State v. Cofield, 320 N.C. 297, 357 S.E.2d 622 (1987).

**Burden of Proof in Establishing Exclusion from Jury.** — If the motion to quash alleges racial discrimination in the composition of the jury, the burden is upon the defendant to establish it, but once he establishes a prima facie case of racial discrimination, the burden of going forward with rebuttal evidence is upon the State. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972); State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

The burden is upon the defendant to establish racial discrimination in the composition of the jury. State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976).

**Evidence Held Insufficient to Establish Prima Facie Discrimination.** — Evidence that the black adult population of a county amounted to 20% of the total county population and that during the biennium beginning January 1970 approximately 10% of the petit jurors appearing for service in the court room were black was held insufficient to make out a prima facie case of racial discrimination. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

Testimony by jury commissioners that, in some instances, they could determine from the address shown on the raw jury list card that a named person lived in a predominantly black or predominantly white neighborhood did not show an opportunity for discrimination sufficient to make out a prima facie case of racial discrimination. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

Mere statement in defendant's brief that the systematic maneuverings of the prosecutor excluded people of defendant's race from the jury, unsupported by the record, failed to show that members of defendant's race were systematically or arbitrarily excluded from the jury panel. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Defendant's mere showing that all blacks were challenged by the prosecuting attorney was not sufficient to establish a prima facie case of an arbitrary and systematic exclusion of blacks from the jury. State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976).

For case in which defendant failed to make out a prima facie case of arbitrary or systematic exclusion of blacks from the jury, see also State v. Shaw, 284 N.C. 366, 200 S.E.2d 585 (1973).

Defendant found guilty of murder and robbery failed to establish a prima facie case of racial discrimination, or a violation of this section, in the State's use of its peremptory challenges where the State's questions during voir dire focused on the prospective juror's feelings about capital punishment and the age of the juror, or his or her children, as compared with defendant's age; the venire persons were brought into the courtroom individually, so neither defendant nor the State knew how many black citizens were present in the venire or whether a black citizen would be examined next, and three of the first four jurors seated were black, both defendant and the victim were black, thus diminishing the likelihood that racial issues were inextricably bound up with the conduct of the trial. State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989), cert. denied, 496 U.S. 905, 110 S. Ct. 2587, 110 L. Ed. 2d 268 (1990).

Trial court did nor err in denying defendant's Batson challenge to the State's exercising of a peremptory challenge to remove a prospective African-American juror because the State's race neutral explanations for using a peremptory challenge to remove a prospective African-American juror — that her responses on death penalty were weak, that she admitted she might develop sympathy toward defendant, and that she made a misrepresentation on her questionnaire — complied with Batson. State v. Alvarez, 168 N.C. App. 487, 608 S.E.2d 371, 2005 N.C. App. LEXIS 342 (2005).

**Preparation of Jury List.** — A jury list is not discriminatory or unlawful because it is drawn from the tax list of the county. Nor is a jury commission limited to the sources specifically designated by G.S. 9-2. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

As to the making of a jury list from the tax list, see also State v. Yoes, 271 N.C. 616, 157 S.E.2d 386 (1967); State v. Wright, 274 N.C. 380, 163 S.E.2d 897 (1968); State v. Ray, 274 N.C. 556, 164 S.E.2d 457 (1968).

**When Exclusion of Class of Persons from Jury Service Will Not Invalidate Indictment.** — Even the complete exclusion, by State law, of a group or class of persons from eligibility for jury service will not make invalid an indictment by a grand jury, selected in accordance with such State law, so long as there is no reasonable basis for the conclusion that the ineligible group or class would bring to the deliberations of the jury a point of view not otherwise represented upon it, at least where the defendant is not a member of the excluded group. State v. Knight, 269 N.C. 100, 152 S.E.2d 179 (1967).

**Exclusion of Age Group from Jury List.** — The absence from the jury list of the names of persons between the ages of 18 and 21 during the period from July, 1971, the effective date of the amendment of G.S. 9-3 lowering the age requirement for jurors from 21 years to 18 years, and September, 1971, the date of defendants' trial, was not unreasonable and did not constitute systematic exclusion of this age group from jury service. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

**Exemption from Jury Duty.** — So far as the requirements of the due process clause of U.S. Const., Amend. XIV are concerned, it is sufficient, in order to sustain a State statutory exemption from jury duty, that there is reasonable ground for the legislature to believe that the public interest and general welfare will be better served by the grant of the exemption than by subjecting the members of the exempted class to the duty imposed upon other members of the community. And it is so held with reference to the provisions of this section. State v. Knight, 269 N.C. 100, 152 S.E.2d 179 (1967).

**A defendant has no vested right to a particular juror.** State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

**And May Not Select One Prejudiced in His Favor.** — When no systematic exclusion is shown, defendant's right is only to reject a juror prejudiced against him; he has no right to select one prejudiced in his favor. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

**Trial Judge Has Discretion to Dismiss Jurors Whose Answers Conflict.** — The trial court did not abuse its discretion in violation of Article I, Sections 19, 23, and 27 of the North Carolina Constitution and G.S. 15A-1212 by excusing for cause a juror who told the prosecutor that he had reasonably strong religious beliefs about the death penalty which he had held for a long period of time; that, because of those beliefs, it would be hard for him to find the death penalty warranted under any circumstances; that his religious beliefs would substantially impair his duty as a juror to recommend to the trial court a punishment of death if the evidence warranted it; but that he could follow the law and "go by which one I thought was right, whoever proved the most." State v. Greene, 351 N.C. 562, 528 S.E.2d 575, 2000 N.C. LEXIS 355 (2000), cert. denied, 531 U.S. 1041, 121 S. Ct. 635, 148 L. Ed. 2d 543 (2000).

**State's Challenges to Jurors Opposed to Death Penalty Upheld.** — Where it was perfectly clear from their answers that each of the prospective jurors, before hearing any of the evidence, had already made up his mind that he would not return a verdict pursuant to which the defendant might lawfully be executed whatever the evidence might be, the State's challenges for cause were properly sustained. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

The practice of "death qualifying" juries in capital cases violates neither the United States Constitution nor this section of the North Carolina Constitution. State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986); State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986); State v. Smith, 320 N.C. 404, 358 S.E.2d 329 (1987).

It was not error under this section or N.C. Const., Art. I, § 24 for the prosecution to use its peremptory challenges to excuse veniremen who had qualms about the death penalty, but were not excludable pursuant to Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776, rehearing denied, 393 U.S. 898, 89 S. Ct. 67, 21 L. Ed. 2d 186 (1968); State v. Allen, 323 N.C. 208, 372 S.E.2d 855 (1988), sentence vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990), in light of McDowell v. Norfolk S.R.R., 186 N.C. 571, 120 S.E. 205, 42 A.L.R. 857 (1923), rehearing denied.

**The erroneous allowance of an improper challenge for cause** does not entitle the adverse party to a new trial, so long as only those who are competent and qualified to serve are actually empaneled upon the jury which tried his case. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

**Exclusion from Grand Jury on Grounds of Race — Denial of Due Process.** — Arbitrary exclusion of citizens from service on grand juries on account of race is a denial of due process to members of the excluded race charged with indictable offenses. State v. Peoples, 131 N.C. 784, 42 S.E. 814 (1902); State v. Lowry, 263 N.C. 536, 139 S.E.2d 870, cert. denied and appeal dismissed, 382 U.S. 22, 86 S. Ct. 227, 15 L. Ed. 2d 16 (1965); State v. Yoes, 271 N.C. 616, 157 S.E.2d 386 (1967).

The indictment of a defendant by a grand jury in a state court from which members of his race have been systematically excluded solely because of their race is a denial of his right to the "law of the land," protected by this section. State v. Perry, 248 N.C. 334, 103 S.E.2d 404 (1958); State v. Covington, 258 N.C. 495, 128 S.E.2d 822 (1963).

**Same — Renders Indictment Invalid.** — An indictment of a defendant by a grand jury from which persons of the defendant's race have been intentionally excluded solely because of their race is not a valid indictment. State v. Covington, 258 N.C. 495, 128 S.E.2d 822 (1963); State v. Yoes, 271 N.C. 616, 157 S.E.2d 386 (1967); State v. Wright, 274 N.C. 380, 163 S.E.2d 897 (1968).

The provisions of this section and N.C. Const., Art. I, § 24 are to be so interpreted that systematic exclusion from the grand jury of persons, otherwise qualified, because of their race, requires, upon motion duly made, the quashing of an indictment returned against a member of that race by such grand jury, irrespective of the fact that all members of the grand jury were, themselves, qualified jurors. State v. Knight, 269 N.C. 100, 152 S.E.2d 179 (1967).

**Same — Test.** — The test is not whether a member of defendant's race did or did not serve on the grand jury in question, nor is it whether there has been discrimination in the selection of other grand juries in the past. The determinative question is whether, in the selection of the grand jury which returned the indictment under attack, there was or was not systematic and arbitrary exclusion of qualified members of defendant's race, either in the composition of the jury box from which the grand jury was drawn or in the drawing therefrom of the grand jury in question. State v. Yoes, 271 N.C. 616, 157 S.E.2d 386 (1967).

**Same — Opportunity to Prove.** — Whether or not the defendant can establish alleged racial discrimination in the drawing and selection of the grand jury, due process of law demands that he have his day in court on this matter, and such day he does not have, unless he has a reasonable opportunity and time to investigate and produce his evidence, if he has any. State v. Covington, 258 N.C. 495, 128 S.E.2d 822 (1963); State v. Inman, 260 N.C. 311, 132 S.E.2d 613 (1963).

One who is indicted for a criminal offense must have a fair opportunity to have it determined by adequate and timely procedure whether members of his race, legally qualified to serve as jurors, have been intentionally excluded on account of their race or color from the grand jury returning the indictment. State v. Wright, 274 N.C. 380, 163 S.E.2d 897 (1968).

**Same — Burden of Proof.** — The burden of proving discriminatory jury practices is upon defendant, but this does not relieve the prosecuting attorney of the duty of going forward with the evidence when the defendant has made out a prima facie case. State v. Wilson, 262 N.C. 419, 137 S.E.2d 109 (1964).

The burden is upon the defendant to establish racial discrimination alleged in his motion to quash the indictment. However, once a prima facie case is made out, the burden shifts to the prosecution. State v. Ray, 274 N.C. 556, 164 S.E.2d 457 (1968).

**Same — Prima Facie Showing.** — Where, at a hearing upon a motion to quash the bill of indictment, there was a showing that a substantial percentage of the population of the county from which the grand jury that returned the bill was drawn was black, and that no blacks, or only a token number, had served on the grand juries of the county over a long period of time, such showing made out a prima facie case of systematic exclusion of blacks from service on the grand jury because of race. State v. Wilson, 262 N.C. 419, 137 S.E.2d 109 (1964).

While neither a showing that, over a substantial period of time, in a county with a relatively large black population, only a few blacks had served on juries, nor a showing that the race of the persons whose names appeared on scrolls in the jury box was designated on such scrolls, was conclusive proof of arbitrary and systematic exclusion of blacks from the grand jury which indicted the defendant, such showing did constitute a prima facie showing of the discrimination forbidden by the law of this State, and cast upon the State the burden to go forward with evidence sufficient to overcome it. State v. Yoes, 271 N.C. 616, 157 S.E.2d 386 (1967).

While it was not enough for the defendant to show that the names which went into the jury box were taken originally from a source which disclosed the race of the persons named in such source material, where the defendant also showed that throughout a substantial period of years, in which essentially the same procedures were used in compiling jury lists, there was repeatedly a marked discrepancy between the number of blacks drawn for grand jury service and the number of blacks whose names appeared on the source material, such circumstances made out a prima facie case of unconstitutional discrimination in the selection of the grand jury which indicted the defendant, and upon such showing, the burden fell to the State to go forward with competent evidence to rebut such prima facie case. State v. Wright, 274 N.C. 380, 163 S.E.2d 897 (1968).

**Same — Overcoming Prima Facie Show-**

**ing.** — To overcome a prima facie case of systematic discrimination because of race, there must be a showing by competent evidence that the institution and management of the jury system of the county is not in fact discriminatory. And if there is contradictory and conflicting evidence, the trial judge must make findings as to all material facts. State v. Wilson, 262 N.C. 419, 137 S.E.2d 109 (1964).

Just as a showing that no blacks served on the particular grand jury which returned the bill of indictment does not make the bill of indictment invalid, so a showing that a black did serve on the particular grand jury, or that a token number of blacks had served on other grand juries, is not necessarily sufficient to rebut a prima facie case of unlawful discrimination. State v. Yoes, 271 N.C. 616, 157 S.E.2d 386 (1967).

**Same — Illustrative Cases.** — Where the evidence disclosed that the names of blacks were printed in red and the names of whites were printed in black in preparing names for the jury box, and that in drawing the names from the box the names of blacks were without exception rejected, the motion of defendant, who was black, to quash the indictment found by a grand jury so selected should have been allowed, since such systematic and arbitrary exclusion of blacks from the grand jury deprived him of his constitutional rights. State v. Speller, 229 N.C. 67, 47 S.E.2d 537 (1948).

Evidence held sufficient to support a finding that there was no racial discrimination in the selection of the grand jury. State v. Perry, 250 N.C. 119, 108 S.E.2d 447, cert. denied, 361 U.S. 833, 80 S. Ct. 83, 4 L. Ed. 2d 74 (1959).

Record held to contain abundant evidence to support the finding by the trial judge that, in the selection of the grand jury which indicted defendants, there was no arbitrary or systematic exclusion of blacks. State v. Yoes, 271 N.C. 616, 157 S.E.2d 386 (1967).

Where defendant's evidence related to the racial composition of only one grand jury and one list of petit jurors, it did not show a course of conduct over a period of time resulting in an apparent systematic exclusion of blacks from the grand juries or list of petit jurors, and thus failed to establish a prima facie case of systematic exclusion of blacks from either the grand jury which indicted defendant or the petit jury which convicted him. State v. Newkirk, 14 N.C. App. 53, 187 S.E.2d 394, cert. denied, 281 N.C. 316, 188 S.E.2d 900 (1972).

**Exclusion of Women from Grand Jury.** — Where male defendant moved to quash indictment on the ground that it was returned by a grand jury composed entirely of men and that women had been unlawfully excluded therefrom, it was held that there had been no discrimination against the class or sex to which defendant belonged, and therefore that he could not raise the question of the qualification of women to serve as jurors or maintain that the proceeding constituted a violation of the equal protection guaranteed by U.S. Const., Amend. XIV and by this section. State v. Sims, 213 N.C. 590, 197 S.E. 176 (1938).

**Exclusion Due to Bias Against Death Penalty.** — Where prospective juror in a first-degree murder prosecution initially responded to both the prosecutor and the court that she did not have any moral or religious convictions against, and could vote for, the death penalty, but she subsequently responded, upon further questioning by the prosecutor, that she would vote against the death penalty without regard to the evidence and notwithstanding the facts or circumstances, and upon further questioning by the court, she was unable to affirmatively agree to follow the law and recommend a sentence based on the evidence and the law and that she would be trying to find ways she could vote against the death penalty and would be predisposed or biased in some respect, the trial court did not err in excusing prospective juror for cause. State v. Jennings, 333 N.C. 579, 430 S.E.2d 188 (1993), cert. denied, 510 U.S. 1028, 114 S. Ct. 644, 126 L. Ed. 2d 602 (1994).

**Racial discrimination in the selection of a grand jury foreman** from a panel of grand jurors selected in a nondiscriminatory manner violates this section and N.C. Const., Art. I, § 26. State v. Cofield, 320 N.C. 297, 357 S.E.2d 622 (1987).

**To Establish Prima Facie Case of Racial Discrimination in Selection of Grand Jury Foreman.** — A black defendant may make out a prima facie case of racial discrimination in the grand jury foreman's selection by showing either (1) that the selection procedure itself was not racially neutral, or (2) that for a substantial period in the past, relatively few blacks have served in the position of foreman even though a substantial number have been selected to serve as members of grand juries; the State may rebut such a prima facie case on remand by offering evidence that the process used in selecting the grand jury foreman was in fact racially neutral. State v. Cofield, 320 N.C. 297, 357 S.E.2d 622 (1987).

**Juror's Failure to Disclose Information.** — Defendant was not denied his rights to confrontation, to effective assistance of counsel, to due process, to a jury trial, and to be free from cruel and unusual punishment when the trial court denied defendant's motion for a mistrial based on the alleged misconduct of a juror; the juror inadvertent failure to disclose the 40-year-old information she had forgotten did not amount to concealment, and the juror demonstrated no bias. State v. Maske, 358 N.C. 40, 591 S.E.2d 521, 2004 N.C. LEXIS 18 (2004).

**Impartiality of Jury Not Compromised by Juror Who Had "Crossed Paths" With**

**Witness.** — Defendant's right to due process was not violated where a juror failed to indicate during jury selection that he knew a witness as the two had merely "crossed paths before" and thus, there was no possibility that a personal connection to the case compromised the juror's ability to be fair and just. State v. Banks, 163 N.C. App. 31, 591 S.E.2d 917, 2004 N.C. App. LEXIS 257 (2004).

**Presence of Magistrate on Jury.** — Defendant's constitutional right to an impartial jury was violated as a magistrate served on defendant's jury while having personal knowledge of defendant's prior drug charges and after having direct pretrial involvement with the charges for which the magistrate participated in deciding defendant's guilt or innocence. State v. Neal, — N.C. App. —, 674 S.E.2d 713, 2009 N.C. App. LEXIS 373 (2009).

### C. Double Jeopardy.

**Section Prohibits Double Jeopardy.** — Under this section, a person cannot be tried twice for the same offense. State v. Mansfield, 207 N.C. 233, 176 S.E. 761 (1934); State v. Crocker, 239 N.C. 446, 80 S.E.2d 243 (1954); State v. Birckhead, 256 N.C. 494, 124 S.E.2d 838 (1962).

Former jeopardy, being based on the fundamental legal principle that a person cannot be tried twice for the same offense, is a good plea. State v. Partlow, 272 N.C. 60, 157 S.E.2d 688 (1967).

**As Part of the Law of the Land.** — It is a fundamental and sacred principle of the common law, deeply imbedded in criminal jurisprudence, that no person can be twice put in jeopardy of life or limb for the same offense. While the principle is not stated in express terms in the North Carolina Constitution, it is regarded as an integral part of the "law of the land" within the meaning of this section. State v. Crocker, 239 N.C. 446, 80 S.E.2d 243 (1954); State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972); State v. Cameron, 283 N.C. 191, 195 S.E.2d 481 (1973); State v. Cannon, 38 N.C. App. 322, 248 S.E.2d 65 (1978).

The sacred principle of the common law that no person can twice be put in jeopardy of life or limb for the same offense has always been an integral part of the law of North Carolina; therefore, the decision in Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969), which made the double jeopardy provision of U.S. Const., Amend. V applicable to the several states through U.S. Const., Amend. XIV, added nothing to the law of this State. State v. Battle, 279 N.C. 484, 183 S.E.2d 641 (1971).

Prohibition against double jeopardy has long been regarded as a part of the "law of the land" in North Carolina. State v. Urban, 31 N.C. App. 531, 230 S.E.2d 210 (1976).

The law of the land clause of the North Carolina Constitution, this section, has also been held to embrace the double jeopardy clause of U.S. Const., Amend. V. State v. Cooley, 47 N.C. App. 376, 268 S.E.2d 87, appeal dismissed and cert. denied, 301 N.C. 96, 273 S.E.2d 442 (1980).

**Guaranteed by Both State and Federal Constitutions.** — It is a fundamental principle of the common law, now guaranteed by the federal and State constitutions, that no person can be twice put in jeopardy of life or limb for the same offense. State v. Cutshall, 278 N.C. 334, 180 S.E.2d 745 (1971); State v. Shuler, 293 N.C. 34, 235 S.E.2d 226 (1977); State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250, appeal dismissed and cert. denied, 301 N.C. 404, 273 S.E.2d 449 (1980).

The common-law principle that no person can be twice put in jeopardy of life or limb for the same offense is now guaranteed by both the federal and State Constitutions. State v. Allen, 16 N.C. App. 159, 191 S.E.2d 403, appeal dismissed, 282 N.C. 305, 192 S.E.2d 193 (1972).

The constitutional prohibition against double jeopardy applies only to criminal cases. State v. Carlisle, 20 N.C. App. 358, 201 S.E.2d 704 (1973), aff'd, 285 N.C. 229, 204 S.E.2d 15 (1974).

**Double Trials and Double Punishment Prohibited.** — The constitutional principle of double jeopardy is designed to protect an accused from double punishment as well as double trials for the same offense. State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); State v. Martin, 47 N.C. App. 223, 267 S.E.2d 35, appeal dismissed and cert. denied, 301 N.C. 238, 283 S.E.2d 134 (1980); State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250, appeal dismissed and cert. denied, 301 N.C. 404, 273 S.E.2d 449 (1980).

A defendant is placed in double jeopardy when he is tried twice or punished twice for the same crime. State v. Carlisle, 20 N.C. App. 358, 201 S.E.2d 704 (1973), aff'd, 285 N.C. 229, 204 S.E.2d 15 (1974).

**Where multiple punishment is involved, the double jeopardy clause acts as a restraint on the prosecutor and the courts,** not the legislature. State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986).

**Double Jeopardy Shown.** — Additional convictions for possession of the automobile and the credit cards were vacated because they violated double jeopardy. State v. Scanlon, 176 N.C. App. 410, 626 S.E.2d 770, 2006 N.C. App. LEXIS 541 (2006).

**And Courts May Not Impose More Punishment Than Intended by Legislature.** — The double jeopardy clauses of both the United States and North Carolina Constitutions prohibit a court from imposing more punishment than that intended by the legislature. State v.

Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986).

**But Legislature May Authorize Cumulative Punishment.** — Where the legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those who statutes proscribe the "same" conduct, a court's task of statutory construction is at an end, and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial. State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986).

**Intent of Legislature Determines Punishment.** — When a defendant is tried in a single trial for violations of two statutes that punish the same conduct, the amount of punishment allowable under the double jeopardy clause of the federal Constitution and the law of the land clause of our State Constitution is determined by the intent of the legislature. State v. Freeland, 316 N.C. 13, 340 S.E.2d 35 (1986).

**Double jeopardy does not prohibit multiple punishments for the same offenses,** where both are tried at the same time, and the Legislature clearly intended them to be punished separately. State v. Strohauer, 84 N.C. App. 68, 351 S.E.2d 823 (1987).

**The general rule is that the defense of double jeopardy is not jurisdictional.** State v. McKenzie, 292 N.C. 170, 232 S.E.2d 424 (1977); State v. Hunter, 48 N.C. App. 656, 270 S.E.2d 120 (1980).

**Double jeopardy is a personal defense.** State v. Hopkins, 279 N.C. 473, 183 S.E.2d 657 (1971); State v. McKenzie, 292 N.C. 170, 232 S.E.2d 424 (1977).

**The burden is upon defendant to sustain his plea** of double jeopardy. State v. Cutshall, 278 N.C. 334, 180 S.E.2d 745 (1971).

Generally the defense of double jeopardy is raised by a special plea upon which the defendant carries the burden. State v. McKenzie, 292 N.C. 170, 232 S.E.2d 424 (1977).

**Abandonment of Plea of Double Jeopardy.** — Where the defendant fails to plea double jeopardy and to offer supporting evidence thereon, he is deemed to have abandoned such plea. State v. Cutshall, 278 N.C. 334, 180 S.E.2d 745 (1971).

**Dismissal on Jurisdiction Only.** — Where the dismissal, upon defendant's motion, was based solely upon the trial court's ruling that it had no jurisdiction and was entirely unrelated to the sufficiency of evidence as to any element of the offense or to defendant's guilt or innocence, and since there was no acquittal or conviction, a retrial would not offend the constitutional protections afforded by the prohibitions against double jeopardy. State v. Priddy, 115 N.C. App. 547, 445 S.E.2d 610, cert. denied, 337 N.C. 805, 449 S.E.2d 751 (1994).

**State's Recidivist Statutes Survive Double Jeopardy Challenges.** — Recidivist statutes, or repeat-offender statutes, survived double jeopardy challenges because they increased the severity of the punishment for the crime being prosecuted, and they did not punish a previous crime a second time; the Apprendi and Blakely holdings did not extend to the habitual misdemeanor assault statute, G.S. 14-33.2. State v. Massey, — N.C. App. —, 635 S.E.2d 528, 2006 N.C. App. LEXIS 2141 (2006).

**When Jeopardy Attaches.** — Jeopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn. State v. Cutshall, 278 N.C. 334, 180 S.E.2d 745 (1971); State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972); State v. Allen, 16 N.C. App. 159, 191 S.E.2d 403, appeal dismissed, 282 N.C. 305, 192 S.E.2d 193 (1972); State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976); State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976); State v. Shuler, 293 N.C. 34, 235 S.E.2d 226 (1977).

It is clearly established in this State that jeopardy cannot attach until a jury has been sworn and empaneled. State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976); State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

In a nonjury criminal trial, jeopardy attaches when the court begins to hear evidence or testimony. State v. Brunson, 327 N.C. 244, 393 S.E.2d 860 (1990).

**Three Situations of Double Jeopardy Identified.** — There are essentially three contexts in which the North Carolina Supreme Court has held that conviction and punishment of a defendant for more than one offense results in impermissible multiple punishment: (1) where a defendant is convicted and sentenced for both felony murder and the underlying felony; (2) where a defendant is convicted and sentenced for two offenses, one being a lesser included offense of the other; and (3) where a defendant is convicted and sentenced for two offenses each arising out of the same conduct, but to which the legislature has affixed two criminal labels, and prosecutorial abuse is evident. State v. Martin, 47 N.C. App. 223, 267 S.E.2d 35, appeal dismissed and cert. denied, 301 N.C. 238, 283 S.E.2d 134 (1980).

**Continuing Offense Precludes Several Violations.** — Defendant's conviction of two counts of keeping and maintaining a dwelling for the use of a controlled substance, where no evidence indicated a termination and subsequent resumption of drug trafficking, was erroneous and constituted double jeopardy. State v. Grady, 136 N.C. App. 394, 524 S.E.2d 75 (2000).

**A plea of former jeopardy must be grounded on the same offense,** both in law and fact. State v. Partlow, 272 N.C. 60, 157 S.E.2d 688 (1967).

To support the plea of double jeopardy, it is of no consequence that the earlier prosecution grew out of the same transaction. It must have been the same offense both in fact and in law. State v. Wiggins, 21 N.C. App. 441, 204 S.E.2d 692, appeal dismissed, 285 N.C. 595, 206 S.E.2d 866 (1974); State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250, appeal dismissed and cert. denied, 301 N.C. 404, 273 S.E.2d 449 (1980).

**Evidence Must Be Identical.** — Double jeopardy does not occur when the evidence to support two or more offenses overlaps, but only when the evidence presented on more than one charge is identical. State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (1980).

Although defendant's husband did not fully penetrate 11-year-old victim until his third attempt, each separate act of intercourse was complete and sufficient to sustain an indictment for first degree rape, and no double jeopardy occurred when defendant/wife was convicted as an aider and abettor for two counts of attempted rape and one count of rape. State v. Owen, 133 N.C. App. 543, 516 S.E.2d 159, 1999 N.C. App. LEXIS 620 (1999), cert. denied, 351 N.C. 117, 540 S.E.2d 743 (1999).

Defendant's convictions for malicious conduct by a prisoner and habitual misdemeanor assault did not charge the same offense, and did not violate the double jeopardy clause; although the conduct alleged in both indictments was identical, the evidence needed to prove both malicious conduct by a prisoner and habitual misdemeanor assault based on an assault of a government employee was different, which meant separate offenses were involved. State v. Artis, 174 N.C. App. 668, 622 S.E.2d 204, 2005 N.C. App. LEXIS 2610 (2005), cert. denied, — N.C. —, 630 S.E.2d 188 (2006).

**Prosecution of a Substantive Criminal Offense Following an Adjudication of Criminal Contempt.** — Where the prohibition in a protective order met the legal elements necessary for assault on a female under G.S. 14-33(b)(2), the defendant's prosecution on this charge, subsequent to his being held in contempt for violating the protective order, was barred by the Double Jeopardy Clause and his conviction for assault on a female was vacated. State v. Gilley, 135 N.C. App. 519, 522 S.E.2d 111, 1999 N.C. App. LEXIS 1177 (1999).

Defendant's convictions for kidnapping, nonfelonious breaking or entering, and domestic criminal trespass did not violate the Double Jeopardy Clause where several elements contained within the applicable statutory language were not set out in the subject protective order, the violation of which defendant had previously been held in contempt. State v. Gilley, 135 N.C. App. 519, 522 S.E.2d 111, 1999 N.C. App. LEXIS 1177 (1999).

**Test for Double Jeopardy.** — The double jeopardy test is whether the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first indictment, or whether the same evidence would support a conviction in each case. State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972); State v. Martin, 47 N.C. App. 223, 267 S.E.2d 35, appeal dismissed and cert. denied, 301 N.C. 238, 283 S.E.2d 134 (1980).

The test of former jeopardy is not whether respondent has been tried for the same act, but whether he has been put in jeopardy for the same offense. The offenses must be the same both in fact and in law. In re Drakeford, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

The applicable double jeopardy test in an assault case is the "same evidence test," which asks two questions: First, whether the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first indictment, the answer to which question is determined by an examination of the two indictments, and second, whether the same evidence would support a conviction in each case, which question looks at facts dehors the indictments. State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

**"Additional Facts" Test Explained.** — The additional facts test of double jeopardy is as follows: A single act may be an offense against two statutes, and if each statute requires proof of an additional fact, which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. State v. Cannon, 38 N.C. App. 322, 248 S.E.2d 65 (1978).

If a single act constitutes an offense against two statutes and each statute requires proof of an additional fact which the other does not, the offenses are not the same in law and in fact and a defendant may be convicted and punished for both. State v. Martin, 47 N.C. App. 223, 267 S.E.2d 35, appeal dismissed and cert. denied, 301 N.C. 238, 283 S.E.2d 134 (1980); State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250, appeal dismissed and cert. denied, 301 N.C. 404, 273 S.E.2d 449 (1980).

**Application of Additional Facts Test.** — The additional facts test is bilateral in its application. The two offenses may have one or more circumstances in common, but in order to constitute either of the offenses sufficiently for prosecution, some additional circumstance must be added. It is the added circumstance which makes each a separate and distinct offense. State v. Cannon, 38 N.C. App. 322, 248 S.E.2d 65 (1978).

Defendant's conviction of three counts of indecent liberties under G.S. 14-202.1(a)(1) for a single episode for touching and sucking a victim's breasts, performing oral sex on the victim, and committing sexual intercourse with the victim did not violate the double jeopardy clause of the U.S. Constitution and N.C. Const., Art. I, § 19, as there were two distinct sexual acts and touch in the single encounter; the indictments each spelled out a separate and distinct fact needed to be proven by the state in order to gain a conviction, and the three acts were distinct acts each constituting the crime of indecent liberties. State v. James, — N.C. App. —, 643 S.E.2d 34, 2007 N.C. App. LEXIS 797 (2007).

**For case espousing a test that includes bad faith prosecutorial overreaching or harassment** aimed at prejudicing defendant's chances for acquittal, whether in the current trial or a retrial, as a standard for prosecutorial misconduct to be applied in assessing double jeopardy claims under the Constitution of North Carolina, see State v. White, 85 N.C. App. 81, 354 S.E.2d 324 (1987), aff'd, 322 N.C. 506, 369 S.E.2d 813 (1988).

**"Lesser Degree" Rule.** — In determining whether jeopardy has attached, it is necessary to apply tests firmly established by the courts. The "lesser degree" rule states that where the second indictment is for a crime greater in degree than the first, and where both indictments arise out of the same act, an acquittal or conviction for the first is a bar to a prosecution for the second. State v. Cannon, 38 N.C. App. 322, 248 S.E.2d 65 (1978).

**Fact that concurrent, identical sentences are imposed in each case** makes duplication of conviction and punishment no less a violation of defendant's constitutional right not to be put in jeopardy twice for the same offense. State v. Martin, 47 N.C. App. 223, 267 S.E.2d 35, appeal dismissed and cert. denied, 301 N.C. 238, 283 S.E.2d 134 (1980).

**Plea of Double Jeopardy May Be Waived.** — The constitutional right not to be placed in jeopardy twice for the same offense, like other constitutional rights, may be waived by a defendant. State v. Hopkins, 279 N.C. 473, 183 S.E.2d 657 (1971).

Defendant's contention that the trial court erred in sentencing defendant to consecutive terms in prison for defendant's two convictions of first-degree sexual offense violated double jeopardy, was not preserved for appellate review because it was not presented to the trial court; in any event, defendant's contention had to be rejected because the sentences were based on separate and distinct acts and did not constitute multiple punishments for a single offense. State v. Gobal, 186 N.C. App. 308, 651 S.E.2d 279, 2007 N.C. App. LEXIS 2199 (2007).

**And Waiver May Be Implied.** — A waiver of the constitutional right not to be placed in jeopardy twice for the same offense is usually implied from the action or inaction of a defendant when brought to trial in a subsequent proceeding. State v. Hopkins, 279 N.C. 473, 183 S.E.2d 657 (1971).

**A plea of guilty constitutes a waiver of the plea of former jeopardy.** State v. Hopkins, 279 N.C. 473, 183 S.E.2d 657 (1971).

**As Does Appeal.** — When a defendant seeks a new trial by appealing his conviction, he waives his protection against reprosecution. State v. Britt, 291 N.C. 528, 231 S.E.2d 644 (1977).

**Plea of No Contest.** — Defendant waived the right to assert a double jeopardy violation by entering pleas of guilty to obtaining property by false pretense and no contest to accessing computers. State v. Hughes, 136 N.C. App. 92, 524 S.E.2d 63, 1999 N.C. App. LEXIS 1302 (1999).

**Plea of Former Jeopardy Deemed Waived When New Trial Awarded.** — When, in either a post-conviction hearing or a habeas corpus proceeding, at the prisoner's request, the court vacates a judgment against him and directs a new trial, the prisoner waives his constitutional protection against double jeopardy, and he may be tried anew on the same indictment for the same offense. In such case, a plea of former jeopardy will avail him nothing. State v. Case, 268 N.C. 330, 150 S.E.2d 509 (1966).

**But it is only where the accused himself brings about destruction of the first verdict that he can be retried** for the same offense. Where the defendant seasonably abandoned his attempt to destroy the verdict which pronounced him guilty of murder in the second degree, a new trial could not lawfully be forced upon him after such abandonment. State v. Case, 268 N.C. 330, 150 S.E.2d 509 (1966).

An accused will be protected from subsequent prosecution for the same offense where a valid judgment is set aside by the court on its own motion or upon application of the prosecuting attorney, unless of course the accused acquiesces in the action. State v. Case, 268 N.C. 330, 150 S.E.2d 509 (1966).

**And if a conviction is reversed for insufficiency of the evidence, double jeopardy precludes remanding** the case for a new trial even if the State has evidence which it could offer at a new trial but did not offer at the trial from which the appeal was taken; however, there is no such impediment in ordering a new trial when the first trial was tainted by mere "trial error." State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981), overruled in part by State v.

Sanderson, 346 N.C. 669, 488 S.E.2d 133, State v. Adams, 347 N.C. 48, 490 S.E.2d 220 (1997).

**Order of mistrial generally will not support a plea of former jeopardy.** State v. Booker, 306 N.C. 302, 293 S.E.2d 78 (1982).

Both federal decisions, applying U.S. Const., Amend. V, and State decisions, applying common law and State constitutional principles, have recognized that, in certain situations arising in criminal prosecutions, the court may order a mistrial before verdict and again place defendant on trial without violating the double jeopardy prohibition. State v. Preston, 9 N.C. App. 71, 175 S.E.2d 705 (1971).

An order of mistrial in a criminal case, entered when the jurors declare their inability to agree, must be left to the trial judge, in the exercise of his judicial discretion, and will not support a plea of former jeopardy. State v. Battle, 279 N.C. 484, 183 S.E.2d 641 (1971).

Double jeopardy clause of North Carolina Constitution, N.C. Const., Art. I, G.S. 19, did not bar prosecution of criminal defendant on felony child abuse charges after her first trial ended in a mistrial when the jury was unable to reach a verdict as dismissal of those charges pursuant to her motion for appropriate relief was improper since the two statutes cited in that motion, N.C. Gen. Stat. G.S. 15A-1227 and N.C. Gen. Stat. G.S. 15A-1414, did not authorize the trial court to grant relief under the facts, and thus, required the motion for appropriate relief to be characterized as a pretrial motion that did not bar the State from appealing the dismissal of the charges. State v. Allen, 144 N.C. App. 386, 548 S.E.2d 554, 2001 N.C. App. LEXIS 437 (2001).

**Test for determining under our State Constitution whether a case may be retried after the court grants a defendant's motion for a mistrial** is as follows: If a defendant moves for a mistrial, he or she normally should be held to have waived the right not to be tried a second time for the same offense. Where the defendant makes such a motion because of prosecutorial misconduct, and the court grants the motion, retrial is not barred by this section unless the defendant shows that the prosecutor was motivated by the intent to provoke a mistrial instead of merely the intent to prejudice the defendant. State v. White, 322 N.C. 506, 369 S.E.2d 813 (1988).

**Where It Is Ordered for Physical Necessity or Necessity of Doing Justice.** — Even where all the elements of jeopardy appear, a plea of former jeopardy will not prevail where an order of mistrial was properly entered for "physical necessity or the necessity of doing justice." State v. Cutshall, 278 N.C. 334, 180 S.E.2d 745 (1971).

A subsequent trial of a defendant, following termination of earlier proceedings upon an order of mistrial, is not precluded by a plea of former jeopardy where the mistrial was granted, over defendant's objections, due to "a physical necessity or the necessity of doing justice." State v. Shuler, 293 N.C. 34, 235 S.E.2d 226 (1977).

**"Physical necessity"** is illustrated where a juror by a sudden attack of illness is wholly disqualified from proceeding with the trial, or where the prisoner becomes insane during the trial, or where a female defendant is taken in labor during the trial. State v. Cutshall, 278 N.C. 334, 180 S.E.2d 745 (1971).

**"Necessity of doing justice"** is not an expression connoting a vague generality, but one that relates to a limited subject, namely, the occurrence of some incident of a nature that would render impossible a fair and impartial trial under the law. State v. Cutshall, 278 N.C. 334, 180 S.E.2d 745 (1971).

"Necessity of doing justice" arises from the duty of the court to guard the administration of justice from fraudulent practices; as in the case of tampering with the jury, or keeping back the witnesses on the part of the prosecution. State v. Cutshall, 278 N.C. 334, 180 S.E.2d 745 (1971).

The test of "necessity of doing justice" does not exist solely for the benefit of a defendant. It is fundamental in our system of jurisprudence that each party to an action is entitled to a fair and impartial trial. State v. Shuler, 293 N.C. 34, 235 S.E.2d 226 (1977).

**No Limit to Number of Mistrials.** — There is no specific limit to the number of times a defendant may be retried after a mistrial has been properly declared. State v. Simpson, 303 N.C. 439, 279 S.E.2d 542 (1981).

**The decision to grant a mistrial is a decision will within the trial judge's discretion** when faced with the occurrence of some incident of a nature that would render impossible a fair and impartial trial under the law. State v. Shuler, 293 N.C. 34, 235 S.E.2d 226 (1977).

**Under North Carolina law, with the concurrence of the defendant, a judge may declare a mistrial at any time during the trial;** where, after the trial started, the trial court judge discovered that he was familiar with certain aspects of the case, and where defendant did not object to the trial court's order of a mistrial, the mistrial was appropriate, and double jeopardy did not prevent later prosecution. State v. Cummings, 169 N.C. App. 249, 609 S.E.2d 423, 2005 N.C. App. LEXIS 513 (2005).

**Duty of Judge Ordering Mistrial in Capital Cases.** — In all cases, capital included, the court may discharge a jury and order a mistrial when it is necessary to attain the ends of justice. It is a matter resting in the sound discretion of the trial judge, but in capital cases he is required to find the facts fully and place them upon the record, so that upon a plea of former jeopardy, the action of the court may be reviewed. State v. Cutshall, 278 N.C. 334, 180 S.E.2d 745 (1971).

In capital cases the trial court must make findings of fact upon granting a mistrial and place them in the record, so that the court's action may be reviewed on appeal. State v. Shuler, 293 N.C. 34, 235 S.E.2d 226 (1977).

**Double Jeopardy Shown in Capital Case.** — Where the initial declaration of a mistrial during the defendant's first trial on the capital charge against her was not the result of manifest necessity, and therefore was error, and it could not be determined from the record whether the error in initially declaring a mistrial caused the jury to fail to reach agreement after the court had reinstated the jury, and thus deprived the defendant of a verdict, the trial court erred when it later denied the defendant's motion to dismiss the charge of murder in the first degree against her for the reason that she had formerly been placed in jeopardy for the same offense. State v. Lachat, 317 N.C. 73, 343 S.E.2d 872 (1986).

**Double Jeopardy Not Shown in Capital Case.** — Imposition of death penalty in the defendant's second trial did not violate double jeopardy or Ring because the jury in the first trial had found at least one statutory aggravator and the jury in the second trial had also found at least one statutory aggravator. State v. Duke, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

**Defendant's failure to object to termination of her first trial for capital murder by a declaration of mistrial** would not prevent her from receiving the relief to which she was otherwise entitled on grounds of former jeopardy, on appeal of her conviction at a second trial. State v. Lachat, 317 N.C. 73, 343 S.E.2d 872 (1986).

**Conviction Under Federal Statute With Sanctions Under State Statute Held Not Double Jeopardy.** — A conviction under a federal statute followed by disciplinary sanctions pursuant to a State statute for the same conduct does not violate the double jeopardy clause. In re Cobb, 102 N.C. App. 466, 402 S.E.2d 475, cert. denied, appeal dismissed, 329 N.C. 269, 407 S.E.2d 832 (1991).

**Reinstatement of a guilty plea following correction of an error of law** did not violate the principles of double jeopardy. State v. Oakley, 75 N.C. App. 99, 330 S.E.2d 59 (1985).

**Parole Revocation Did Not Result in Additional Punishment Within the Meaning of Double Jeopardy.** — Double jeopardy prohibition did not bar a prosecution for failure to comply with sex offender registration, despite the fact that the grounds for this prosecution were the same as used to revoke defendant's parole from a sentence imposed in a separate case. State v. Sparks, 182 N.C. App. 45, 641 S.E.2d 339, 2007 N.C. App. LEXIS 488 (2007).

**Prosecutorial Misconduct Intended to Provoke Motion for Mistrial.** — Where the former trial is terminated by a mistrial granted at the request of, or with the consent of, the defendant, the general rule is that the double jeopardy clause does not bar retrial, even if the defendant's motion for mistrial is made as a result of prosecutorial error; however, where the prosecutorial misconduct giving rise to the defendant's motion for mistrial is intended to goad or provoke the defendant into moving for a mistrial, the defendant may invoke the protection of the double jeopardy clause to bar a retrial. State v. Major, 84 N.C. App. 421, 352 S.E.2d 862 (1987).

**Double Jeopardy Not Shown.** — Where each defendant was separately arraigned and pleaded to the bill of indictment, following which the cases were continued to the next term of court, defendants were not twice put in jeopardy by a second arraignment when the cases were called for trial the following term. State v. Watson, 209 N.C. 229, 183 S.E. 286 (1936).

Defendant was not subjected to double jeopardy, and was subjected to only one trial, where his trial was temporarily interrupted based upon the unexpected inability of a scheduled witness to be present due to his physical condition. State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Double jeopardy did not result when defendant was tried and convicted of kidnapping for the purpose of facilitating flight following his participation in an armed robbery and of armed robbery, since the intent of the legislature in establishing the punishment for kidnapping was to impose an indivisible penalty for restraint and removal for specified purposes, no hypothetical part of which penalty represents a punishment for the felony which gave rise to the flight of defendant and his removal of the victim, and since the crimes of armed robbery and kidnapping involve vastly different social implications, and the legislature is clearly free to denounce each as a separately punishable offense. State v. Martin, 47 N.C. App. 223, 267 S.E.2d 35, appeal dismissed and cert. denied, 301 N.C. 238, 283 S.E.2d 134 (1980).

Conviction and sentence of defendant for assault with a deadly weapon with intent to kill inflicting serious injury and assault with intent to commit rape did not subject him to double jeopardy, since the elements for the two crimes are not the same. State v. Herring, 50 N.C. App. 298, 273 S.E.2d 29 (1981).

Defendant's convictions of two violations of G.S. 14-27.7, engaging in a sexual act and in intercourse with a person over whom his employer had custody, following his earlier acquittal of second degree rape under G.S. 14-27.3 and committing a sex act on a person who was physically helpless under G.S. 14-27.5 and vacation of his conviction of engaging in a sex act by force and against victim's will in violation of G.S. 14-27.5 did not violate the double jeopardy clauses of U.S. Const., Amend. V and this section of the North Carolina Constitution, as the offenses that defendant was convicted of were not lesser included offenses of the crimes that he was earlier tried for. State v. Raines, 81 N.C. App. 299, 344 S.E.2d 138 (1986), aff'd, 319 N.C. 258, 354 S.E.2d 486 (1987).

Defendant who was convicted for robbing a bank in this State of $6,058.00 with a dangerous weapon in violation of 18 U.S.C. § 2113(d) was not entitled to dismissal of an indictment in the Superior Court of Perquimans County for committing the same robbery with a dangerous weapon in violation of G.S. 14-87 on double jeopardy grounds, as defendant was not being prosecuted for the "same offense" as he had been punished for in federal court. State v. Myers, 82 N.C. App. 299, 346 S.E.2d 273 (1986).

Convictions of statutory rape, taking indecent liberties with a child, and incest, all arising out of the same transaction, did not violate the defendant's rights against double jeopardy; the three are legally separate and distinct crimes, none of which is a lesser included offense of another. State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

The crime against nature, taking indecent liberties with a child, and sexual offense in the second degree are legally separate and distinct crimes, and convictions for all three crimes arising out of the same transaction did not place the defendant in double jeopardy. State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

Defendant held to have failed to establish his double jeopardy claim under the State Constitution based on prosecutorial misconduct resulting in his request for a mistrial, where it could not be said that the State's case was going so badly and the prejudice resulting from the prosecutor's conduct was so grave that the defendant's choice to continue or to abort the proceedings was rendered unmeaningful. State v. White, 85 N.C. App. 81, 354 S.E.2d 324 (1987), aff'd, 322 N.C. 506, 369 S.E.2d 813 (1988).

Trial court did not err by permitting State to try defendant for both burglary and first degree murder of victim; although the intended felony for the burglary was murder of the victim; since at least one essential element of each crime was not an element of the other, there was no merit in defendant's contentions that he was subjected to double jeopardy. State v. Parks, 324 N.C. 94, 376 S.E.2d 4 (1989).

Prosecution on two counts of discharging a firearm into occupied property did not violate federal and State prohibitions against double jeopardy even though 3606 and 3608 Jonquil Street were apartments located within the same building; the facts alleged in the second count of the indictment — that the building was located at 3608 Jonquil Street and was occupied by one set of victims, would not have sustained defendant's conviction for shooting into 3606 Jonquil while that residence was occupied by another set of victims. State v. Ray, 97 N.C. App. 621, 389 S.E.2d 422 (1990).

Defendant's two convictions and punishments for trafficking in cocaine by possession and felonious possession of cocaine, based on the same contraband, do not violate the principles of double jeopardy. State v. Pipkins, 337 N.C. 431, 446 S.E.2d 360 (1994).

Defendant's burglary conviction did not violate double jeopardy principles where he was also convicted for first degree felony-murder. There was no inconsistency in the jury finding a lack of premeditation and deliberation required for first degree murder but finding the requisite intent to murder to satisfy a burglary conviction. State v. Blyther, 138 N.C. App. 443, 531 S.E.2d 855, 2000 N.C. App. LEXIS 619 (2000).

Defendant's conviction for conspiracy to commit murder did not merge into her conviction for murder by acting in concert because the requirement of an agreement, while necessary to sustain a conviction for conspiracy, was not a necessary element for murder by acting in concert. State v. Kemmerlin, 356 N.C. 446, 573 S.E.2d 870, 2002 N.C. LEXIS 1260 (2002).

Defendant's constitutional double jeopardy protection was not violated where defendant was convicted of first-degree kidnapping, assault with a deadly weapon with intent to kill inflicting serious injury, and maiming without malice because the offenses contained distinct elements not found in the others. State v. Scott, 161 N.C. App. 104, 587 S.E.2d 485, 2003 N.C. App. LEXIS 1999 (2003), cert. denied, 358 N.C. 158, 593 S.E.2d 398 (2004).

Where defendant dragged his wife by the hair into the house and then beat her with his gun, defendant's convictions of first-degree kidnapping in violation of G.S. 14-39(a) and assault with a deadly weapon inflicting serious injury in violation of G.S. 14-32(b) did not violate double jeopardy under N.C. Const., Art. I, § 19; the restraint and removal of the wife, which was the act of dragging her into the house, were separate from the commission of the assault, which was the act of beating the wife with the gun once the kidnapping had been completed. State v. Romero, 164 N.C. App. 169, 595 S.E.2d 208, 2004 N.C. App. LEXIS 729 (2004).

Trial court did not err by submitting to the jury both attempted first-degree murder and assault with a deadly weapon inflicting serious injury, and by imposing consecutive sentences for the offenses, because each offense contained at least one element not included in the other; therefore, defendants were not been subjected to double jeopardy. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

Because the elements of assault with a deadly weapon inflicting serious injury and the elements of first-degree kidnapping did not coincide, defendant was not punished twice for inflicting the same injury on the victim. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

Where the facts underlying the jury's guilty verdict for assault with a deadly weapon on a government official in violation of G.S. 14-34.2 were not the same facts underlying the jury's verdict of guilty for assault with a deadly weapon in violation of G.S. 14-32, and where the evidence showed that defendant completed the first assault on an officer by driving a truck over the officer's leg just before the officer pulled defendant from the truck and then completed the second instance of assault independently of the first assault by reentering the vehicle and driving it toward the officer, defendant's convictions on both charges did not violate double jeopardy; neither U.S. Const., Amend. XIV nor N.C. Const., Art. I, § 19, forbade the prosecution and punishment of defendant for those two separate and distinct crimes. State v. Spellman, 167 N.C. App. 374, 605 S.E.2d 696, 2004 N.C. App. LEXIS 2380 (2004).

Trial court did not err in imposing judgments of conviction upon defendant for both assault with a deadly weapon with intent to kill while inflicting serious injury and discharging a weapon into occupied property; entry of those judgments of conviction did not violate defendant's right to be free from double jeopardy, because the same evidence was not used to prove both offenses. State v. Allah, 168 N.C. App. 190, 607 S.E.2d 311, 2005 N.C. App. LEXIS 144 (2005), cert. denied, 359 N.C. 636, 618 S.E.2d 232 (2005).

There was no risk of a lack of unanimity where defendant was charged with and convicted of the same number of offenses, and the evidence supported that number of offenses; using the same underlying act to support convictions for both first-degree sexual offense and indecent liberties did not violate defendant's constitutional protection against double jeopardy. State v. Brewer, 171 N.C. App. 686, 615 S.E.2d 360, 2005 N.C. App. LEXIS 1363 (2005), cert. denied, — N.C. —, 632 S.E.2d 493 (2006).

Defendant's constitutional challenges to his sentence as an habitual felon failed because (1) the North Carolina Habitual Felon Act was not violative of the Separation of Powers Clause; (2) there was no double jeopardy infirmity inherent in the Habitual Felon Act as applied in conjunction with the North Carolina Structured Sentencing Act; and (3) the state appellate court and the state supreme court have rejected constitutional challenges to the Habitual Felon Act based on allegations of cruel and unusual punishment. State v. McIlwaine, 169 N.C. App. 397, 610 S.E.2d 399, 2005 N.C. App. LEXIS 607 (2005).

Mere fact that the state asked defendant to stipulate to a prior felony that did not correspond to the prior felony stated in the indictment did not render the error a substantive evidentiary one attributable to the state; instead, the record revealed an intention by defense counsel, after conferring with defendant, to stipulate to a prior felony and an assumption by the state that the stipulation relieved it of the burden of establishing that element of the possession of a firearm by a felon charge. State v. Mason, 174 N.C. App. 206, 620 S.E.2d 285, 2005 N.C. App. LEXIS 2292 (2005).

Indictments posed no danger to defendant's rights under the double jeopardy clause because, while he was tried for acts of sexual assault that occurred in one county, he was not tried for any acts he may have committed in another county. State v. Bullock, 178 N.C. App. 460, 631 S.E.2d 868, 2006 N.C. App. LEXIS 1572 (2006).

Defendant's prior conviction of felonious breaking and entering was not an "offense" within the meaning of the Double Jeopardy Clause when construed with defendant's conviction of possession of a firearm by a felon; defendant was not prosecuted nor punished again for the underlying conviction for felonious breaking and entering, but was convicted and punished for defendant's subsequent act of unlawfully possessing a firearm as a convicted felon. State v. Wood, 185 N.C. App. 227, 647 S.E.2d 679, 2007 N.C. App. LEXIS 1674 (2007).

Fact that defendant was sentenced on both a first-degree kidnapping conviction and a robbery with a dangerous weapon conviction did not violate his double jeopardy rights, as proof of the kidnapping did not require proof of the commission of the robbery itself; further, as the jury had concluded that there was sufficient evidence to find defendant guilty of the separate offenses, the trial court was bound by G.S. 15A-1340.17 to sentence defendant on each conviction. State v. Moffitt, 185 N.C. App. 308, 648 S.E.2d 272, 2007 N.C. App. LEXIS 1737 (2007).

Where defendant restrained a victim and prevented the victim from leaving her home by holding onto her shirt and pulling her back from the door before defendant subsequently committed a robbery of the same victim with a dangerous weapon, a separate conviction of defendant for kidnapping, in violation of G.S.

14-39(a)(2), was proper and not violative of U.S. Const., Amend. XIV and N.C. Const., Art. I, § 19; the restraint and removal of the victim was a distinct criminal transaction that facilitated the accompanying felony offense. State v. Boyce, 361 N.C. 670, 651 S.E.2d 879, 2007 N.C. LEXIS 1104 (2007).

Because the evidence showed that defendant fired seven shots toward the victim's car and that one bullet hole was found in the victim's car, it did not violate the double jeopardy clauses of the North Carolina and federal constitutions to impose three separate sentences for three counts of attempted discharge of a firearm into occupied property or to sentence defendant both for the three attempt counts and for one completed offense. Each shot fired at the victim's car was a separate offense under G.S. 14-34.1. State v. Hagans, 188 N.C. App. 799, 656 S.E.2d 704, 2008 N.C. App. LEXIS 259 (2008).

No double jeopardy existed where defendant was convicted of both discharging a firearm into a vehicle and felony murder, because North Carolina does not recognize the merger doctrine. State v. Jackson, 189 N.C. App. 747, 659 S.E.2d 73, 2008 N.C. App. LEXIS 689 (2008), review denied, appeal dismissed, 668 S.E.2d 569 (2008), cert. denied, 129 S. Ct. 1532 (U.S. 2009).

Defendant's revocation of his post-release supervision for leaving his residence without notifying his post-release officer and failing to notify the post-release officer of his whereabouts, and defendant's prosecution for failing to notify the sheriff of his change of address as a sex offender, as required by G.S. 14-208.9 and in violation of G.S. 14-208.11, did not violate defendant's double jeopardy rights under either N.C. Const., Art. I, § 19 or the Double Jeopardy Clause of the Fifth Amendment. The revocation was not a criminal proceeding and related to defendant's original sex offense convictions rather than the offense of failing to notify the sheriff of a change of address. State v. Sparks, 362 N.C. 181, 657 S.E.2d 655, 2008 N.C. LEXIS 149 (2008).

Use of defendant's prior conviction for possession of cocaine to support defendant's conviction for possession of a firearm by a felon and defendant's sentencing as a habitual felon did not constitute double jeopardy. State v. Williams, 191 N.C. App. 96, 662 S.E.2d 397, 2008 N.C. App. LEXIS 1152 (2008).

Defendant's right to be free from double jeopardy was not violated because none of the elements for indecent liberties with a child and using a minor in obscenity were the same; therefore, defendant did not receive ineffective assistance of counsel for failure to raise the double jeopardy argument. State v. Martin, — N.C. App. —, 671 S.E.2d 53, 2009 N.C. App. LEXIS 55 (2009).

**No Double Jeopardy Where There Was No Final Verdict in the First Case.** — Where a jury wrote a note to the court indicating that it could unanimously agree that minimally the defendant was guilty of second degree murder, but could not unanimously reach a verdict with regard to first degree murder, and the jury was erroneously advised that it must unanimously agree to acquittal of first degree murder before consideration of the lesser offense, a retrial of defendant for first degree murder did not constitute double jeopardy since there was never a final verdict in the first trial. State v. Mays, 158 N.C. App. 563, 582 S.E.2d 360, 2003 N.C. App. LEXIS 1254 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 379 (2003), cert. denied, 358 N.C. 547, 599 S.E.2d 913 (2004).

**Possession of Stolen Vehicle and Possession of Stolen Property.** — Defendant's conviction and sentencing for possession of a stolen vehicle, in violation of G.S. 20-106, and possession of stolen property, in violation of G.S. 14-71.1, for possession of the vehicle, violated double jeopardy because the legislature did not intend to punish a defendant for possession of the same property twice. State v. Bailey, 157 N.C. App. 80, 577 S.E.2d 683, 2003 N.C. App. LEXIS 377 (2003).

**Possession and Sale as Separate Offenses.** — For cases holding that possession and sale of controlled substances are separate offenses, and that a defendant will not be subjected to double jeopardy when he is tried for both, see State v. Cameron, 283 N.C. 191, 195 S.E.2d 481 (1973); State v. Patterson, 21 N.C. App. 443, 204 S.E.2d 709 (1974); State v. Aikens, 22 N.C. App. 310, 206 S.E.2d 348, aff'd, 286 N.C. 202, 209 S.E.2d 763 (1974); State v. Gleason, 24 N.C. App. 732, 212 S.E.2d 213 (1975); State v. Salem, 50 N.C. App. 419, 274 S.E.2d 501, cert. denied, 302 N.C. 401, 279 S.E.2d 355 (1981).

**Defendant may be convicted for both conspiracy to commit robbery and the commission of the same robbery** without being subject to double jeopardy. State v. Wiggins, 21 N.C. App. 441, 204 S.E.2d 692, appeal dismissed, 285 N.C. 595, 206 S.E.2d 866 (1974).

**Convictions May Be Had for Breaking or Entering and Larceny.** — The prohibitions in the United States and North Carolina Constitutions against placing a person twice in jeopardy do not prohibit, in a single trial, convictions and punishment for both breaking or entering and felony larceny based upon that breaking or entering. State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986).

Conviction and punishment for both felony breaking or entering and felonious larceny based upon the same breaking or entering in a single trial is not prohibited by the provisions of either the Constitution of the United States or the Constitution of North Carolina. State v. Edmondson, 316 N.C. 187, 340 S.E.2d 110 (1986).

**Because the crimes of larceny and obtaining property by false pretenses are separate** and distinguishable offenses, the issuance of a second indictment for false pretenses, after the dismissal of larceny charges at the close of the State's evidence, did not constitute double jeopardy. State v. Kelly, 75 N.C. App. 461, 331 S.E.2d 227, cert. denied, 315 N.C. 187, 339 S.E.2d 409 (1985).

**Robbery defendant's double jeopardy rights were violated** because the fact that the bank's money was obtained from two tellers did not allow the State to indict defendant for two separate armed robberies. State v. Becton, 163 N.C. App. 592, 594 S.E.2d 143, 2004 N.C. App. LEXIS 419 (2004), appeal dismissed, 358 N.C. 733, 601 S.E.2d 862 (2004).

**Double Jeopardy Shown in Assault Convictions and Sentences.** — Defendant could not be convicted and sentenced for both assault with a deadly weapon with intent to kill inflicting serious injury, pursuant to G.S. 14-32(b), and assault inflicting serious bodily injury, G.S. 14-32.4, for the same conduct without violating the double jeopardy provisions of the United States and North Carolina Constitutions. State v. Ezell, 159 N.C. App. 103, 582 S.E.2d 679, 2003 N.C. App. LEXIS 1418 (2003).

**Double Jeopardy Shown in Robbery and Kidnapping Convictions.** — Since the State failed to show that the removal of the victims was separate from the robbery, that it increased the danger beyond that inherent in the robbery, that the victims were physically injured, or that they were subjected to restraint beyond that of the threatened use of a firearm, defendant's kidnapping convictions were reversed as being in violation of double jeopardy. State v. Ripley, 172 N.C. App. 453, 617 S.E.2d 106, 2005 N.C. App. LEXIS 1801 (2005), aff'd, 360 N.C. 333, 626 S.E.2d 289 (2006).

**Double Jeopardy Shown in Rape Convictions.** — In a case in which the defendant and an accomplice raped a woman, defendant was entitled to a new trial on the charge of first degree rape by acting in concert with someone else because the jury instruction referred to guilt both as a principle and by acting in concert, which allowed the jury to convict defendant twice for the same crime, in violation of double jeopardy rights. State v. Person, 187 N.C. App. 512, 653 S.E.2d 560, 2007 N.C. App. LEXIS 2574 (2007).

**Sex offender monitoring not a double jeopardy violation.** — Lifetime satellite-based monitoring pursuant to G.S. 14-208.40(a)(1) did not violate double jeopardy because its imposition was not a punishment. State v. Anderson, — N.C. App. —, 679 S.E.2d 165, 2009 N.C. App. LEXIS 1106 (July 7, 2009).

**Each Seized Item of Obscene Material a Separate Offense.** — The trial court did not err by refusing to arrest judgment on defendant's two counts of disseminating obscenity, even though the films sold police were sold in the same transaction, since it was the clear intent of the legislature to treat the dissemination of each seized item of obscene material as a separate offense. State v. Von Wilds, 88 N.C. App. 69, 362 S.E.2d 605 (1987), cert. denied, 322 N.C. 329, 368 S.E.2d 873 (1988).

**In this State a defendant may not be punished both for felony murder and for the underlying "predicate" felony,** even in a single prosecution. Whether in other situations multiple punishments may be imposed when a defendant, in a single trial, is convicted of multiple offenses when some are fully, factually embraced within others is to be determined on the basis of legislative intent. State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986).

**The offenses of attempted murder and felonious assault are not duplicitous** and the charging of both is, therefore, not double jeopardy; assault with a deadly weapon with intent to kill, unlike attempted murder, requires proof of the use of a deadly weapon, and malice is an element of attempted murder, but not of felonious assault with a deadly weapon with intent to kill. State v. Washington, 141 N.C. App. 354, 540 S.E.2d 388, 2000 N.C. App. LEXIS 1405 (2000), cert denied, 353 N.C. 396, 547 S.E.2d 427 (2001).

**Plea of Former Jeopardy Upheld.** — Where judgment of nonsuit on the ground of variance was entered in a defendant's trial upon an indictment charging armed robbery of a store in which the life of a named employee was endangered and in which money belonging to the store was taken from the named employee, and where defendant was subsequently prosecuted upon another armed robbery indictment for the same occurrence, which alleged that the lives of two other employees were endangered and that the money was taken from the two other employees, and where the evidence in both trials showed that the robbery was perpetrated by endangering and threatening all employees then present in the store, including those named in both indictments, but that the money was removed from the immediate presence of the two employees named in the second indictment, as the same evidence would have supported a conviction in both trials, defendant's plea of former jeopardy prior to his second trial should have been allowed. State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972).

Where the affray charge upon which juvenile was convicted had as an essential element the assault charge which had been dismissed for lack of evidence, respondent's acquittal on the assault charge barred further petitions based on that charge. In re Drakeford, 32 N.C. App.

113, 230 S.E.2d 779 (1977).

**Arrest of Judgment Required.** — Although prosecution of defendants for assault on a law enforcement officer with a firearm and for assault with a deadly weapon with intent to kill did not violate the prohibition against double jeopardy, nor require the State to elect prosecution under a single statute, since each offense required proof of an element which did not exist in the other charge, arrest of judgment of their conviction of the lesser offense was required when they were convicted of both crimes, since assault and the use of a deadly weapon were necessarily included in the offense of assault on a law enforcement officer with a firearm, and defendants could not be punished twice for the same offense. State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250, appeal dismissed and cert. denied, 301 N.C. 404, 273 S.E.2d 449 (1980).

Where a defendant was convicted of assault with a firearm on a law enforcement officer and assault with a deadly weapon based on the same conduct, and because assault with a deadly weapon by way of a firearm is necessarily included in the offense of assault with a firearm on a law enforcement officer, a judgment on both assault with a deadly weapon and assault with a firearm on a law enforcement officer could not stand; the assault with a deadly weapon charge should have been arrested by the trial court. State v. Dickens, 162 N.C. App. 632, 592 S.E.2d 567, 2004 N.C. App. LEXIS 269 (2004).

It was reversible error to impose sentences for a first-degree kidnapping and attempted robbery with a dangerous weapon offenses, both of which the jury was instructed could serve as underlying felonies to the charge of felony murder. State v. Oglesby, 174 N.C. App. 658, 622 S.E.2d 152, 2005 N.C. App. LEXIS 2624 (2005), aff'd in part, vacated in part, review improvidently allowed in part, 361 N.C. 550, 648 S.E.2d 819 (2007).

**Final verdict is required before there can be an implied acquittal.** Jury votes on included offenses may be the result of a temporary compromise in an effort to reach unanimity. A jury should not be precluded from reconsidering a previous vote on any issue, and the weight of final adjudication should not be given to any jury action that is not returned in a final verdict. State v. Booker, 306 N.C. 302, 293 S.E.2d 78 (1982).

**Revocation of Driver's License Cannot Constitute Double Jeopardy.** — Since the revocation of a driver's license is not a form of criminal punishment, it cannot constitute double jeopardy. State v. Carlisle, 20 N.C. App. 358, 201 S.E.2d 704 (1973), aff'd, 285 N.C. 229, 204 S.E.2d 15 (1974).

The ten-day driver's license revocation under G.S. 20-16.5 did not constitute punishment as such; therefore, defendant's subsequent criminal conviction for DWI did not violate the double jeopardy clause. State v. Oliver, 343 N.C. 202, 470 S.E.2d 16 (1996).

Revocation of defendant's driver's license did not constitute criminal punishment and, thus, defendant's conviction for driving while impaired did not violate N.C. Const., Art. I, §§ 19 and 23. State v. Hinchman, — N.C. App. —, 666 S.E.2d 199, 2008 N.C. App. LEXIS 1667 (2008).

**Order Denying Motion Immediately Appealable.** — A defendant's right not to be unconstitutionally subjected to multiple criminal trials for the same offense is a substantial right, a violation of which cannot be fully remedied by an appeal taken after the subsequent trial has already occurred because the mere fact of the subsequent trial is a violation of the protected right; therefore, where a motion for dismissal of criminal charges is based upon double jeopardy grounds, an order denying the motion is immediately appealable. State v. Major, 84 N.C. App. 421, 352 S.E.2d 862 (1987).

**Expulsion from a school for violation of school policies is not punishment so as to invoke the protection of constitutional double jeopardy** restrictions because important, if not essential, nonpunitive purposes are served by administrative suspension and expulsion. State v. Davis, 126 N.C. App. 415, 485 S.E.2d 329 (1997).

**Felonious Assault and Misdemeanor Assault Sentences Constituted Double Jeopardy.** — Trial court violated defendant's right to be free of double jeopardy when it sentenced him for both assault with a deadly weapon inflicting serious injury under G.S. 14-32(b) and misdemeanor assault inflicting serious injury under G.S. 14-33(c)(1) based on an incident in which defendant punched his girlfriend into a wall and stabbed her multiple times in the arm and leg; because defendant's convictions under G.S. 14-32(b) provided for greater punishment than G.S. 14-32.4 or 14-33(c), the trial court could not convict and sentence defendant under two statutes for the same conduct in each incident without violating the double jeopardy provisions of U.S. Const., Amend. 5 and N.C. Const., Art. I, § 19. State v. McCoy, 174 N.C. App. 105, 620 S.E.2d 863, 2005 N.C. App. LEXIS 2289 (2005).

### D. Right to Counsel.

**Right to Counsel Dependent on Potential Confinement.** — The strict distinctions formerly drawn between criminal and civil actions are no longer valid, and due process presumptively requires the appointment of legal counsel to represent an indigent defendant if his actual imprisonment, or comparable confinement, is a likely result in the proceeding at hand. Wake County ex rel. Carrington v. Townes, 306 N.C. 333, 293 S.E.2d 95 (1982), cert. denied, 459 U.S. 1113, 103 S. Ct. 745, 75 L. Ed. 2d 965 (1983).

**Right to Counsel Guaranteed.** — An accused's right to counsel in a criminal prosecution is guaranteed by U.S. Const., Amend. VI and is applicable to the states through U.S. Const., Amend. XIV, N.C. Const., Art. I, § 23 and this section. State v. Shores, 102 N.C. App. 473, 402 S.E.2d 162 (1991).

**Conflict of Interest.** — Because defendant did not waive her right to conflict free counsel, she argued that she claimed possession of the heroin and the paraphernalia to protect her boyfriend, and because he was represented by defense counsel's boss, there was a potential for a conflict under N.C. R. Prof. Conduct 1.7(a); thus, a hearing should have been held. State v. Mims, 180 N.C. App. 403, 637 S.E.2d 244, 2006 N.C. App. LEXIS 2405 (2006).

Defendant's rights under the Sixth Amendment and N.C. Const., Art. I, §§ 19 and 23 were not violated by the denial of defense counsel's motion to withdraw since an inquiry was conducted into counsel's allegation that counsel had a conflict of interest under N.C. Rev. R. Prof. Conduct 1.7(a) because a former client was called as a witness against defendant; there was no conflict since: (1) counsel had represented the witness three years prior to defendant's trial and was no longer representing the witness; (2) counsel had no recollection as to specifics of the witness's case aside from the fact that the witness had been convicted; (3) counsel's statement that counsel would review counsel's file to see if counsel had any information to help defendant proved that counsel was committed to defendant's case; and (4) counsel made significant inroads to undermine the witness's credibility. State v. Thomas, 187 N.C. App. 140, 651 S.E.2d 924, 2007 N.C. App. LEXIS 2309 (2007).

**The guarantee of counsel only applies to "critical stages" of the prosecution,** and what constitutes a critical stage is determined both from the nature of the proceedings and from the facts in each case. State v. Hall, 39 N.C. App. 728, 252 S.E.2d 100 (1979).

**A probable cause hearing is a "critical stage" of the criminal process** entitling an indigent person to appointed counsel if he desires such assistance. State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978).

**Administration of a gunshot residue test is not a critical stage** of criminal proceedings to which the constitutional right to counsel attaches. Therefore, testimony that defendant refused to submit to the test until she talked to her attorney did not violate her constitutional rights. State v. Odom, 303 N.C. 163, 277 S.E.2d 352, cert. denied, 454 U.S. 1052, 102 S. Ct. 596, 70 L. Ed. 2d 587 (1981), rehearing denied, 454 U.S. 1165, 102 S. Ct. 1041, 71 L. Ed. 2d 322 (1982).

**Right to Counsel Includes Reasonable Time for Preparation.** — The constitutional right to assistance of counsel necessarily includes that counsel should have a reasonable time to prepare for trial. However, no set length of time for investigation, preparation and presentation is required, and whether defendant is denied due process must be determined upon the basis of the circumstances in each case. State v. Moore, 39 N.C. App. 643, 251 S.E.2d 647, appeal dismissed, 297 N.C. 178, 254 S.E.2d 39 (1979).

Trial court did not err in denying defendant's motion for a continuance where the state, in defendant's attempted first-degree murder and assault with a deadly weapon case, presented defendant with a statement on the morning of trial that it had obtained from the man who had allegedly sold defendant the gun used in the shootings involved in defendant's case; defendant had not shown evidence that he would have been better prepared had the motion to continue been granted or that he was materially prejudiced by the denial of his motion, and defendant was given a recess by the trial court to allow his counsel to interview the man. State v. Bethea, 173 N.C. App. 43, 617 S.E.2d 687, 2005 N.C. App. LEXIS 1907 (2005).

**But Mere Failure to Grant a Continuance Is Not a Denial of Effective Assistance.** — Unless counsel suggests the existence of material witnesses or information that would possibly lead to material evidence or material witnesses, the mere failure to grant a continuance in order for the defense to make an investigation would not, in and of itself, constitute a denial of effective assistance of counsel. State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978).

**Prevention of Adequate Preparation by Defendant.** — The conduct of a defendant in failing either to retain counsel or to avail himself of his right, if any, to court appointed counsel, may make him solely responsible for any lack of trial preparation on the part of his counsel. State v. McDiarmid, 36 N.C. App. 230, 243 S.E.2d 398 (1978).

**Decision Not to Introduce Evidence.** — The trial court's deferral of its ruling, on whether introduction of certain evidence by defendant would open the door to permit the State to introduce irrelevant and prejudicial evidence about defendant's prior convictions, did not improperly chill the defendant's rights to introduce evidence; his decision not to introduce the evidence was purely tactical and did not implicate any rights. State v. Holman, 353 N.C. 174, 540 S.E.2d 18, 2000 N.C. LEXIS 909 (2000), cert. denied, 534 U.S. 910, 122 S. Ct. 250, 151 L. Ed. 2d 181 (2001), cert. denied, — N.C. —, 619 S.E.2d 854 (2005).

**Assistance of Counsel Means Effective Assistance.** — The right to counsel is not intended to be simply an empty formality, but is intended to guarantee effective assistance of counsel. State v. Hensley, 294 N.C. 231, 240 S.E.2d 332 (1978); State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Constitutional right to counsel has long been recognized as an entitlement to the effective assistance of counsel. State v. Vickers, 306 N.C. 90, 291 S.E.2d 599 (1982).

**Test of effective assistance of counsel** is whether the assistance given was within the range of competence demanded of attorneys in criminal cases. State v. Vickers, 306 N.C. 90, 291 S.E.2d 599 (1982); State v. Scober, 74 N.C. App. 469, 328 S.E.2d 590 (1985).

There are no set rules to determine whether a defendant has been deprived of effective assistance of counsel; rather, each case must be approached upon an ad hoc basis, viewing the circumstances as a whole in order to determine this question. State v. Hensley, 294 N.C. 231, 240 S.E.2d 332 (1978).

**Question of failure of counsel to render effective representation** may be considered on direct appeal. State v. Hensley, 294 N.C. 231, 240 S.E.2d 332 (1978).

**Trial Judge Better Able to Evaluate Effectiveness.** — The trial judge, who actually sees the lawyer's behavior, is better able than an appellate court to evaluate the overall effectiveness of representation. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

**Physical Incapacity of Counsel.** — The question of effective assistance of counsel involving the physical incapacity of counsel does not turn on the physical incapacity of counsel as such, since this may or may not deprive a defendant of effective representation. Rather, it is necessary to examine counsel's specific acts or omissions which the defendant alleges constitute a denial of effective assistance. The reviewing court must approach such questions ad hoc and in each case must view the circumstances as a whole. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Notwithstanding defense attorney's hearing disability, his efforts and the assistance of co-counsel were held to have provided defendant with effective legal representation throughout criminal proceedings. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

**A defendant in a criminal proceeding, whether at trial or in pretrial proceedings, may waive his right to counsel** if he does so freely and understandingly and with full knowledge of his right to be represented by counsel. State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978).

**Indigent Defendant May Waive Counsel.** — The purpose of the statutory provision for appointment of counsel at public expense for indigent defendants is to put indigent defendants on an equality with affluent defendants in trials upon criminal charges. To deny or to restrict the right of the indigent to waive counsel and represent himself, while permitting the affluent defendant to exercise such right, would be beyond the power of the legislature, as such action would have no reasonable relation to the objective of equal opportunity. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

Indigency is obviously a sufficient basis for classification with reference to the right to court-appointed, publicly paid counsel, but it is not a reasonable basis for classification as to the right to represent one's self. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

**For case upholding finding that defendant's counsel was not ineffective but if he was, the defendant did not show prejudice,** see State v. Swann, 322 N.C. 666, 370 S.E.2d 533 (1988).

**Defendant did not invoke his right to counsel;** thus, the motion to suppress defendant's statement was properly denied. State v. Davis, 124 N.C. App. 93, 476 S.E.2d 453 (1996).

**Right to Counsel Held Waived.** — Even though counsel was appointed for defendant, he waived the right to have counsel when he initiated a conversation and volunteered statements to investigators without being questioned; neither his Fifth Amendment nor his Sixth Amendment rights were violated and his statements were properly admitted at his trial. State v. Boggess, 358 N.C. 676, 600 S.E.2d 453, 2004 N.C. LEXIS 912 (2004).

**Illustrative Cases.** — Defendant's contention that the district attorney's argument to the jury referring repeatedly to the fact that defense counsel was from another part of the State constituted prejudicial error and denied the defendant due process and the effective assistance of counsel would be overruled where defense counsel had opened the door with abusive comments attacking the credibility of two State witnesses and the honesty of two local law-enforcement officers. State v. McCall, 289 N.C. 512, 223 S.E.2d 303, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

In the absence of any showing that the withdrawal of a motion to consolidate for trial charges against two defendants in any way prejudiced defendant's case and denied him his right to effective counsel, there was no error in denial of his motion to continue. State v. Minshew, 33 N.C. App. 593, 235 S.E.2d 866 (1977).

In a prosecution for kidnapping and assaulting a policeman with a firearm, the trial court erred in denying defendant's motion for a continuance under circumstances in which the 17 days defendant's counsel had to prepare for trial was not a reasonable time to comply with defendant's constitutional right to assistance of counsel in his defense. State v. Moore, 39 N.C.

App. 643, 251 S.E.2d 647, appeal dismissed, 297 N.C. 178, 254 S.E.2d 39 (1979).

Trial counsel's failure to move for exclusion of three State's witnesses from the courtroom until each one was called to testify was not evidence of ineffective assistance of counsel. State v. Roberts, 49 N.C. App. 52, 270 S.E.2d 559 (1980), appeal dismissed and cert. denied, 301 N.C. 726, 276 S.E.2d 286 (1981).

Where the record did not indicate any impermissibly suggestive pretrial identification procedures that would have tainted the witnesses' in-court identifications, defendant's counsel's failure to object or move for a voir dire examination was not indicative of ineffective representation. State v. Roberts, 49 N.C. App. 52, 270 S.E.2d 559 (1980), appeal dismissed and cert. denied, 301 N.C. 726, 276 S.E.2d 286 (1981).

Defense counsel's failure to move for dismissal on the grounds of insufficient evidence at the close of all the evidence did not prejudice the defendant and did not constitute ineffective representation, because the sufficiency of the evidence was reviewable on appeal without regard to whether a motion was made at trial. State v. Roberts, 49 N.C. App. 52, 270 S.E.2d 559 (1980), appeal dismissed and cert. denied, 301 N.C. 726, 276 S.E.2d 286 (1981).

The counsel's substandard performance was prejudicial to the rape defendant where the defense's failure to produce any evidence to support the theories proffered at the outset of the trial, including consent of the victim and inability of the defendant to perform the alleged acts, formed the basis of one of the principal closing arguments made by the State in favor of conviction. State v. Moorman, 320 N.C. 387, 358 S.E.2d 502 (1987).

The right of a defendant accused of second degree murder to have an attorney of his own choosing was overridden by the trial court's interest in conducting a fair and unbiased legal proceeding where the defendant's counsel had previously represented the victim in her divorce and drafted a power of attorney for her signature prior to her death. State v. Taylor, 155 N.C. App. 251, 574 S.E.2d 58, 2002 N.C. App. LEXIS 1633 (2002), cert. denied, 357 N.C. 65, 579 S.E.2d 572 (2003).

As defendant's denial of his pointing of any gun was inconsistent with the defenses of necessity or justification, defendant's attorney made a tactical decision to present a theory of defense based upon defendant's own statements to police; as such, defense counsel's decision not to request jury instructions on necessity and justification with respect to a charge of assault by pointing a gun could not be ineffective assistance of counsel. State v. Langley, 173 N.C. App. 194, 618 S.E.2d 253, 2005 N.C. App. LEXIS 1920 (2005), cert. dismissed, — N.C. —, 630 S.E.2d 447 (2006), cert. denied, — N.C. —, 630 S.E.2d 447 (2006).

Defendant failed to show that there was a reasonable probability that, absent out-of-court statements that his counsel failed to object to, the trial result would have been different. Accordingly, his assignment of error based on ineffective assistance of counsel was without merit. State v. Thorne, 173 N.C. App. 393, 618 S.E.2d 790, 2005 N.C. App. LEXIS 2031 (2005).

As defendant's denial of his pointing of any gun was inconsistent with the defenses of necessity or justification, defendant's attorney made a tactical decision to present a theory of defense based upon defendant's own statements to police; as such, defense counsel's decision not to request jury instructions on necessity and justification with respect to a charge of assault by pointing a gun could not be ineffective assistance of counsel. State v. Langley, 173 N.C. App. 194, 618 S.E.2d 253, 2005 N.C. App. LEXIS 1920 (2005), cert. dismissed, — N.C. —, 630 S.E.2d 447 (2006), cert. denied, — N.C. —, 630 S.E.2d 447 (2006).

### E. Time to Prepare Defense.

**Defendant Is Entitled to Time and Opportunity to Investigate and Produce Evidence.** — Due process requires that every defendant be allowed a reasonable time and opportunity to investigate and produce competent evidence, if he can, in defense of the crime with which he stands charged and to confront his accusers with other testimony. State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

**And to Prepare His Defense.** — It is implicit in these constitutional guarantees that an accused and his counsel shall have a reasonable time to investigate, prepare and present the defense of the accused. State v. Vick, 287 N.C. 37, 213 S.E.2d 335, cert. dismissed, 423 U.S. 918, 96 S. Ct. 228, 46 L. Ed. 2d 367 (1975).

Implicit in the constitutional right to effective counsel is that an accused and his counsel shall have a reasonable time to investigate, prepare and present the defense. State v. Minshew, 33 N.C. App. 593, 235 S.E.2d 866 (1977).

Trial court did not err in denying the defendant's motions for a continuance before trial and during trial as the defendant failed to prove he would acquire proof of his innocence because of the continuance. State v. Marecek, 152 N.C. App. 479, 568 S.E.2d 237, 2002 N.C. App. LEXIS 967 (2002).

**But due process does not include the right to fish in psychiatric ponds for immaterial evidence.** State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

**Analysis of Evidence by Expert.** — In defendant's trial on a charge of first degree murder, the trial court erred by denying defendant's motion for a continuance so she could find an expert to analyze the State's expert's conclusion that there was blood splatter on defendant's clothes which suggested that defendant was present when a victim was struck, and the appellate court ordered a new trial because the State did not carry its burden of showing that the trial court's ruling was harmless beyond a reasonable doubt. State v. Barlowe, 157 N.C. App. 249, 578 S.E.2d 660, 2003 N.C. App. LEXIS 536 (2003).

**The question as to whether defendant has sufficient time to prepare his defense** before trial is one addressed to the sound discretion of the trial judge, which will not be reviewed on appeal when it is not made to appear that his discretionary power has been abused by him. State v. Burnett, 184 N.C. 783, 115 S.E. 57 (1922).

No set length of time for investigation, preparation and presentation of defense is required, and whether defendant is denied due process must be determined upon the basis of the circumstances of each case. State v. Vick, 287 N.C. 37, 213 S.E.2d 335, cert. dismissed, 423 U.S. 918, 96 S. Ct. 228, 46 L. Ed. 2d 367 (1975); State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978).

**Denial of Continuance Held Improper.** — The defendant was entitled to a new trial because the court's denials of his repeated motions for a continuance resulted in a violation of his constitutional rights to effective assistance of counsel, to confront his accusers, and to due process of law. Defendant's counsels had only thirty-four days to prepare for a complex, bifurcated capital case, involving multiple incidents in multiple locations over a two-day period, which they took over from another attorney who had done little other than filing pretrial motions while trying to persuade the defendant to accept a plea bargain. No evidence existed that any witness interviews had been performed; the orders based on the trial court's rulings on pretrial motions had not been prepared; and a jury questionnaire was not submitted for distribution to prospective jurors. State v. Rogers, 352 N.C. 119, 529 S.E.2d 671, 2000 N.C. LEXIS 430 (2000).

**Delay Forced by Defendant.** — There was no constitutional violation where defendant clearly had ample time to confer with counsel, investigate, and present his defense. Defendant may not force a delay in proceedings by retaining counsel and refusing to agree to a fee arrangement. State v. Cuevas, 121 N.C. App. 553, 468 S.E.2d 425 (1996).

**Defendant Offered Insufficient Evidence.** — The circumstances surrounding the trial court's denial of the defendant's motion to continue did not demonstrate that it was unlikely that the defendant could have received effective assistance of counsel. The defendant failed to offer evidence tending to establish a violation of his constitutional right to a reasonable time to investigate, prepare and present his defense for murder charge and did not show that he had inadequate time to confer with counsel or that counsel had inadequate time to prepare for trial. State v. Tunstall, 334 N.C. 320, 432 S.E.2d 331 (1993).

**When Motion for Continuance Presents Question of Law.** — Ordinarily, whether a cause shall be continued is a matter which rests in the sound discretion of the trial court and, in the absence of gross abuse, is not subject to review on appeal, but when the motion is based on a right guaranteed by the federal and State Constitutions, the question presented is one of law and not of discretion, and the decision of the court below is reviewable. State v. Farrell, 223 N.C. 321, 26 S.E.2d 322 (1943); State v. Lane, 258 N.C. 349, 128 S.E.2d 389 (1962).

When a motion for a continuance is based on a right guaranteed by the federal and State Constitutions, the question presented is one of law and not of discretion, and the decision of the trial court is reviewable on appeal. State v. Atkinson, 7 N.C. App. 355, 172 S.E.2d 249 (1970); State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976).

Where a motion for continuance is based on a right guaranteed by the Constitution, the decision of the trial judge is reviewable as a question of law without a prior determination that there has been a gross abuse of discretion. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

**Indictment, Arraignment and Trial on Same Day.** — Defendant's indictment, arraignment, and trial on the same day on a burglary charge was not such a flagrant violation of his due process rights that the court was required to dismiss the indictment, since defendant, by not contesting additional indictments for armed robbery, larceny, and rape conceded that he had been given sufficient time in which to prepare a defense on these charges; the burglary indictment arose out of the same series of events which led to the three other indictments; the offenses took place at such a close proximity in time that any defense which counsel might have prepared to the charge of burglary could not have significantly differed from the defenses he did prepare to the charges of larceny, armed robbery, and rape, and any proof of the nonexistence of the essential elements of burglary would necessarily be included in defendant's defense on the other charges in this case, because for each charge defendant would seek to disprove the State's evidence of the sequence of events leading up to the charge, which facts also supported the burglary indictment. State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (1980).

**Illustrative Cases.** — Findings in post-conviction proceeding, disclosing that petitioners, although jointly tried, were not allowed to communicate with one another prior to trial, and that there attempts to contact witnesses and friends were unsuccessful, did not support the lower court's conclusion of law that petitioners had not been denied any rights guaranteed to them by this section and N.C. Const., Art. I, § 23 and by U.S. Const., Amend. XIV. State v. Wheeler, 249 N.C. 187, 105 S.E.2d 615 (1958).

Where the trial court had determined from evidence of defendant's impaired mental capacity that the interests of justice required that defendant's case be continued in order that defendant could be granted the opportunity to seek compulsory attendance of witnesses and the effective assistance of counsel, the trial court's action in allowing the case to proceed to trial upon defendant's motion for a speedy trial and for leave to withdraw his prior motions for a continuance, where no evidence was introduced before the trial court indicating that defendant's impairments had subsided or no longer existed, constituted a denial of defendant's rights to due process of law and equal protection of the laws. State v. Brooks, 38 N.C. App. 445, 248 S.E.2d 369 (1978).

Where defendant made no credible demonstration that a continuance would have enabled him to secure his psychiatrist's attendance, the judge did not err, nor did he abuse his discretion, by refusing to grant a continuance, and even had the judge's denial of the motion been erroneous constitutionally, defendant failed to demonstrate prejudice. State v. Attmore, 92 N.C. App. 385, 374 S.E.2d 649 (1988), cert. denied, 324 N.C. 248, 377 S.E.2d 757 (1989).

### F. Witnesses.

**Section Preserves Right of Confrontation and Cross-Examination.** — "The law of the land" guaranteed by this section of the Constitution, which is synonymous with "due process," preserves the right of confrontation and cross-examination to an accused in a criminal action. By cross-examination a witness may be questioned as to prior inconsistent statements or as to any act inconsistent with his testimony in order to impeach him or cast doubt upon his credibility. State v. Gaiten, 277 N.C. 236, 176 S.E.2d 778 (1970).

The "law of the land" guaranteed by this section is synonymous with "due process," and it preserves the right of confrontation and cross-examination to an accused party. State v. Phillips, 88 N.C. App. 526, 364 S.E.2d 196 (1988), rev'd on other grounds, 325 N.C. 222, 381 S.E.2d 325 (1989).

**The right to face one's accusers** and witnesses with other testimony is guaranteed by U.S. Const., Amend. VI, which is made applicable to the states by U.S. Const., Amend. XIV, and by this section and N.C. Const., Art. I, § 23. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972); State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976); State v. Harris, 290 N.C. 681, 228 S.E.2d 437 (1976).

**New Trial Is Not Barred by Death of Defendant's Witness.** — To hold that when a defendant in a criminal action by his appeal has secured a new trial, he cannot be prosecuted promptly again, because by the death of a witness who would testify in his favor, if alive, at the time of the retrial, he would in such trial by such death and loss of evidence be denied the right of due process of law under U.S. Const., Amend. XIV and to the rights of "the law of the land" provision of this section, would mean that some, if not many, cases could not be tried again. State v. Patton, 260 N.C. 359, 132 S.E.2d 891 (1963), cert. denied, 376 U.S. 956, 84 S. Ct. 977, 11 L. Ed. 2d 974 (1964).

When a defendant by his appeal obtains a new trial, the law does not require that the State in order to prosecute him again must guarantee that all his witnesses shall be alive and capable of testifying for him at the retrial, for to require that would be for the law to exact of the State impossibilities. State v. Patton, 260 N.C. 359, 132 S.E.2d 891 (1963), cert. denied, 376 U.S. 956, 84 S. Ct. 977, 11 L. Ed. 2d 974 (1964).

**But Defendant Must Be Discharged If State's Essential Witnesses Are Dead.** — If a defendant by his appeal secures a new trial, and if at the time of the new trial the State's essential witnesses are dead or incapable of testifying, the State has no other recourse than to discharge the defendant, no matter how guilty he may be. State v. Patton, 260 N.C. 359, 132 S.E.2d 891 (1963), cert. denied, 376 U.S. 956, 84 S. Ct. 977, 11 L. Ed. 2d 974 (1964).

**Trial court's denial of defendant's motion for separate trial** so prejudiced his defense as to amount to a denial of due process and his right to confrontation where defendant was precluded under the circumstances of the joint trial from introducing evidence of codefendant's out-of-court statement, which would have strengthened defendant's alibi defense. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

**Admissibility of Death Certificate.** — Defendant's right to confrontation and his right to fundamental fairness in his criminal trial were violated by admission in evidence of hearsay and conclusory statement in victim's death certificate. State v. Watson, 281 N.C. 221, 188 S.E.2d 289, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972).

**Denial of Motion to Examine Written Pretrial Statements of State's Witnesses.** — Denial of defense counsel's motion to examine State's witnesses' pretrial statements which had been reduced to writing violated defendant's due process rights. State v. Voncannon, 49 N.C. App. 637, 272 S.E.2d 153 (1980), rev'd on other grounds, 302 N.C. 619, 276 S.E.2d 370 (1981).

**Denial of motion for a continuance to secure the attendance and testimony** of a sergeant as a necessary and material witness for the defense was not erroneous because defendant did not articulate any specific facts about which the sergeant would testify and which would substantiate defendant's defense. State v. Walston, — N.C. App. —, 666 S.E.2d 872, 2008 N.C. App. LEXIS 1749 (2008).

**Defendant Failed to Show His Right to the Aid of a Pathologist.** — Even though defendant's identity as the perpetrator of the crime charged was critical, and the state's case was built on circumstantial evidence, defendant had not demonstrated that a pathologist could have offered anything to his defense where the assistance of the pathologist sought by defendant would have been of little, if any, value to him, and defendant failed to satisfy his burden of showing either that the assistance of a pathologist would have materially aided him in the preparation of his defense or that the lack thereof deprived him of a fair trial. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994), cert. denied, 514 U.S. 1091, 115 S. Ct. 1815, 131 L. Ed. 2d 738 (1995).

**Reliability of Informants.** — A defendant is entitled to question police as to the reliability of an informer when the constitutional validity of his arrest is challenged. State v. Moore, 275 N.C. 141, 166 S.E.2d 53 (1969).

**Disclosure of Informant's Identity.** — The privilege against disclosure of an informant's identity is based on the public policy of the furtherance and protection of the public interest in effective law enforcement. However, the privilege must give way where the disclosure of the informer's identity, or of the contents of his communication, is relevant and helpful to the defense of the accused, or is essential to fair determination of a cause. State v. Moore, 275 N.C. 141, 166 S.E.2d 53 (1969); State v. Cameron, 283 N.C. 191, 195 S.E.2d 481 (1973).

**Right of Cross-Examination — Generally.** — One of the most jealously guarded rights in the administration of justice is that of cross-examining an adversary's witnesses. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

**Same — Impeachment.** — A witness, including a defendant in a criminal action, is subject to being impeached or discredited by cross-examination. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

In cross-examination a witness, including a defendant in a criminal case, may be asked all sorts of disparaging questions, and he may be particularly asked whether he has committed specified criminal acts or has been guilty of specified reprehensible or degrading conduct. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

A witness, including a defendant in a criminal case, cannot be impeached by cross-examination as to whether he has been arrested for, indicted for or accused of an unrelated criminal offense. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

**Same — Burden of Proof.** — Appellant has the burden of showing not only error but also prejudicial error on appeal of trial judge's refusal to allow cross-examination of a witness. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

**Same — Illustrative Cases.** — The right of the defendant in a criminal action to cross-examine expert witnesses who have testified against him is a material one, guaranteed by this section of the Constitution, and a denial thereof may not be held as merely a technicality and harmless; nor would this error be cured by the fact that defendant had an opportunity to cross-examine one of these witnesses in refutation of the correctness of the facts upon which his conclusion was based, especially when the other witness was regarded as the most important one. State v. Hightower, 187 N.C. 300, 121 S.E. 616 (1924).

The "law of the land" guaranteed by this section, synonymous with due process of law, guarantees to one charged with contempt of court by an asserted willful violation of a restraining order a right, when he denies the asserted violation, to confront and cross-examine witnesses by whose testimony the asserted violation is to be established. Harriet Cotton Mills v. Local 578, Textile Workers Union, 251 N.C. 218, 111 S.E.2d 457 (1959), cert. denied, 362 U.S. 941, 80 S. Ct. 806, 4 L. Ed. 2d 770 (1960).

**Victim impact statements may be used at sentencing** hearings, except in capital cases. State v. Phillips, 325 N.C. 222, 381 S.E.2d 325 (1989).

**Use of Closed Circuit Television in Court Room Held Adequate to Provide Defendant Opportunity to Cross-examine Child Victim.** — Where, in prosecution for taking indecent liberties with a four-year-old child, during voir dire hearing as to victim's competency as a witness, defendant, although absent from the courtroom, was able to hear all testimony, interact freely with his attorney, and through his attorney confront the victim, thereby accomplishing effective cross-examination, the exclusion of defendant did not violate this section or N.C. Const., Art. I, § 18 or § 23, as the trial court's use of a closed circuit television and its act of providing defendant and his attorney adequate opportunity to communicate during the victim's testimony were sufficient to permit defendant to hear the evidence and to refute it. State v. Jones, 89 N.C. App. 584, 367 S.E.2d 139 (1988).

**Illustrative Cases.** — Where defendant had the opportunity to cross-examine both witnesses in his murder trial, the confrontation clause was not violated as to the victim's grandmother's testimony concerning what she told the defendant and as to the letter written from the victim to the defendant, authenticated by two witnesses. State v. Quick, 323 N.C. 675, 375 S.E.2d 156 (1989).

### G. Identification of Defendant.

**The test under the due process clause as to pretrial identification procedure** is whether the totality of the circumstances reveals that the pretrial procedures were so unnecessarily suggestive and conducive to an irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice. State v. Artis, 31 N.C. App. 193, 228 S.E.2d 768, cert. denied, 291 N.C. 449, 230 S.E.2d 766 (1976); State v. Moses, 52 N.C. App. 412, 279 S.E.2d 59, cert. denied, 303 N.C. 318, 281 S.E.2d 390 (1981).

**Factors to be considered in evaluating the likelihood of mistaken identification** for due process pretrial identification purposes include (1) the opportunity of the witness to observe the defendant at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' description of the defendant, (4) the level of certainty demonstrated by the witness, and (5) the length of time between the crime and the confrontation. State v. Moses, 52 N.C. App. 412, 279 S.E.2d 59, cert. denied, 303 N.C. 318, 281 S.E.2d 390 (1981).

**Brevity and Reliability.** — Where testifying witness observed defendant during the day, from a short distance, and long enough to notice his unseasonable clothing, the witness's identification of him was not too brief and therefore not inherently incredible, and its admittance into evidence was not violative of his due process rights under this section and N.C. Const., Art. I, § 23 and 27. State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

**Showups.** — Although the practice of showing suspects singly for identification purposes has been recognized as suggestive and widely condemned, whether such a confrontation violates due process depends upon the totality of the circumstances. State v. Shore, 285 N.C. 328, 204 S.E.2d 682 (1974).

**Requirements for In-Custody Confrontation for Identification Purposes.** — An in-custody confrontation for identification purposes requires that: (1) the accused must be warned of his constitutional right to the presence of counsel during the confrontation; (2) when counsel is not knowingly waived and is not present, the testimony of witnesses that they identified the accused at the confrontation must be excluded; and (3) the in-court identification of the accused by a witness who participated in the pretrial out-of-court confrontation must likewise be excluded unless it is first determined on voir dire that the in-court identification is of independent origin and is thus not tainted by the illegal pretrial identification procedure. Failure to observe these requirements is a denial of due process. State v. Tann, 302 N.C. 89, 273 S.E.2d 720 (1981).

**Requirements of Photographic Lineup.** — Due process does not require that all subjects in a photographic lineup be identical in appearance, nor is such a lineup impermissibly suggestive merely because the defendant has a distinctive appearance. State v. Tutt, 171 N.C. App. 518, 615 S.E.2d 688, 2005 N.C. App. LEXIS 1313 (2005).

**Convictions based on eyewitness identification at trial following a pretrial identification by photograph** will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. State v. Legette, 292 N.C. 44, 231 S.E.2d 896 (1977).

**In-Court Identification Upheld.** — When the trial court found and concluded that the in-court identification of defendant by witnesses was not tainted by any outside confrontation, but was based upon identification during the course of the alleged robbery, and this finding was supported by competent evidence, it alone rendered the in-court identification competent, even it if was conceded arguendo that the showup procedure was improper. State v. Shore, 285 N.C. 328, 204 S.E.2d 682 (1974).

Where nothing in the record indicated that the out-of-court photographic identification, which identified defendant as the perpetrator of the crime, was unlawful and impermissibly suggestive, the in-court identification was not tainted by the out-of-court identification. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Prior to seeing defendant's photograph, a witness: (1) gave an accurate physical description of defendant as a short, white, heavyset male; (2) correctly identified defendant's first name; (3) gave an accurate description of defendant's residence, which was corroborated by defendant's mother; and (4) told police she knew of defendant and had seen him at the same convenience store in possession of guns one week prior to the shooting; the witness was able to view the criminal before and at the time of the crime and testified she saw defendant lower the gun after the victim was shot and drive away from the scene. A lieutenant showed the witness the picture of defendant on the night of the shooting, while she was at the hospital with the victim, and the time between the crime and the confrontation was short; thus, the photographic identification was not so prejudicial that justice could not have been done, and the trial court did not err when it allowed the witness to make an in-court identification of defendant. State v. Farmer, 177 N.C. App. 710, 630 S.E.2d 244, 2006 N.C. App. LEXIS 1201 (2006).

Admission of a pretrial identification and in-court identification of defendant did not violate defendant's due process rights because the pretrial display made to the witness was not done in a manner as to be so impermissibly suggestive, the witness had sufficient opportunity to observe the man he was identifying, and the descriptions provided to investigators were consistent with later observations in the witness' testimony. State v. Pulley, 180 N.C. App. 54, 636 S.E.2d 231, 2006 N.C. App. LEXIS 2242 (2006).

**Finding Conclusive When Supported by Competent Evidence.** — A finding that an in-court identification of defendant was not tainted or rendered incompetent as evidence by subsequent unconstitutional showup, when supported by competent evidence, was conclusive on appellate courts, both State and federal. State v. Odom, 18 N.C. App. 478, 197 S.E.2d 35 (1973).

**Admissibility of Photograph.** — Admission of photograph of a lineup including defendant was not violative of his rights under this section and N.C. Const., Art. I, § 23, where the photograph was properly identified and entered into evidence for the purpose of illustrating the testimony of a witness, and although the defendant objected to the questions identifying the picture, he did not ask that its admission be restricted. State v. McKissick, 271 N.C. 500, 157 S.E.2d 112 (1967).

Denial of defendant's motion to suppress a pretrial photo line was proper where none of the five other photos chosen indicated unfairness, nor were they unduly suggestive, and, while the trial court recognized the witness' confusion, it gave weight to a detective's testimony. State v. Tutt, 171 N.C. App. 518, 615 S.E.2d 688, 2005 N.C. App. LEXIS 1313 (2005).

### H. Self-Incrimination.

**Inculpatory Statements.** — Cases dealing with a defendant's inculpatory statements project two predominant concerns: (1) that the circumstances surrounding defendant's interrogation do not render his statement inherently unreliable because it was involuntary; and (2) that overzealous officers be deterred from the use of unconstitutional and illegal practices in obtaining a statement from the accused. State v. Hudson, 281 N.C. 100, 187 S.E.2d 756 (1972), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

**Court's denial of defendant's motion to suppress in-custody inculpatory statements** he gave to law enforcement officers did not violate his constitutional rights. State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

**Voir Dire Hearing to Determine Voluntariness.** — In this jurisdiction, when a purported confession of a defendant is offered into evidence and defendant objects, the trial judge, in the absence of the jury, hears evidence of both the State and the defendant upon the question of the voluntariness of defendant's statements. The general rule is that after such inquiry, when there is conflicting evidence offered at the voir dire hearing, the trial judge shall make findings of fact to show the basis of his ruling on the admissibility of the evidence offered. State v. Moore, 275 N.C. 141, 166 S.E.2d 53 (1969).

Every statement made by a person in custody as a result of an illegal arrest is not ipso facto involuntary and inadmissible, but the facts and circumstances surrounding such arrest and the in-custody statement should be considered in determining whether the statement is voluntary and admissible. Voluntariness remains as the test of admissibility. State v. Moore, 275 N.C. 141, 166 S.E.2d 53 (1969).

**Confession Held Voluntary**. — The granting of defendant's request to see his girlfriend and the mother of his child did not render his confession involuntary where the investigators's statements that they would attempt to contact the women were made only in response to defendant's request, where there was no evidence that investigators used the request as an inducement to obtain his confession, where investigators advised defendant that the police had no control over whether the women came to the station, where defendant himself stated that his confession was not thereby induced, and where the request had no relation to relief from the charges he faced. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326, 2000 N.C. LEXIS 350 (2000), cert. denied, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000).

**Exhibition of Defendant to Jury.** — Defendant was not denied due process of law when he was compelled to exhibit himself to the jury for purpose of allowing police officer to identify certain physical characteristics on defendant's person, since such procedure did not offend the sense of justice implicit in the due process clause of U.S. Const., Amend. XIV and this section, but such procedure was simply a logical extension of the rule that witnesses may testify as to a defendant's physical condition or as to identifying marks on his body. State v. McNeil, 47 N.C. App. 30, 266 S.E.2d 824, appeal dismissed and cert. denied, 301 N.C. 102, 273 S.E.2d 306 (1980); 450 U.S. 915, 101 S. Ct. 1356, 67 L. Ed. 2d 339 (1981).

**Exclusion of Second Confession After Improper First Confession.** — Neither this section nor G.S. 23 of N.C. Const., Art. I required the suppression of a defendant's second confession, made after proper warnings and the defendant's voluntary waiver of his constitutional rights, when that confession followed an earlier confession which had to be excluded under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). State v. Hicks, 333 N.C. 467, 428 S.E.2d 167 (1993), overruled in part on other grounds, State v. Buchanan, 353 N.C. 332, 543 S.E.2d 823 (2001).

**Demonstration by Defendant.** — This section was not violated by requiring defendant to stand before the jury and place orange stocking mask over his head and face in the way the victim had testified it was worn by the man who robbed and shot her. State v. Perry, 291 N.C. 284, 230 S.E.2d 141 (1976).

**Impeachment Upheld.** — The prosecutor's impeachment of defendant by cross-examining him about his failure to tell officers, while making an in-custody statement, that he was acting to protect himself from attack by deceased when he shot deceased did not violate defendant's rights under U.S. Const., Amend. V or Amend. XIV or this section or N.C. Const., Art. I, § 23. State v. Haith, 48 N.C. App. 319, 269 S.E.2d 205, appeal dismissed and cert. denied, 301 N.C. 403, 273 S.E.2d 449 (1980).

**Statements Deemed Voluntary.** — The trial court's findings of fact, not specifically excepted to by the defendant, fully supported its conclusions of law that defendant's statements to the police were freely, voluntarily and understandingly made and that none of the defendant's State constitutional rights were violated by his arrest, detention, interrogation or statements. State v. Cheek, 351 N.C. 48, 520 S.E.2d 545, 1999 N.C. App. LEXIS 1158 (1999), cert. denied, 530 U.S. 1245, 120 S. Ct. 2694, 147 L. Ed. 2d 965 (2000).

### I. Restraint of Defendant at Trial.

**There is no ban, constitutional or otherwise, against physical restraint in the courtroom per se.** — What is forbidden by the due process and fair trial guarantees of U.S. Const., Amend. XIV and this section of the North Carolina Constitution is physical restraint that improperly deprives a defendant of a fair trial. State v. Wright, 82 N.C. App. 450, 346 S.E.2d 510 (1986).

While, as a general rule, a criminal defendant is entitled to be free from physical restraint at his trial, unless there are extraordinary circumstances which require otherwise, there is no per se prohibition against the use of restraint when it is necessary to maintain order or prevent escape; what is forbidden is physical restraint that improperly deprives a defendant of a fair trial. State v. Simpson, 153 N.C. App. 807, 571 S.E.2d 274, 2002 N.C. App. LEXIS 1251 (2002).

**A defendant may be physically restrained during his trial when restraint is necessary** to maintain order, prevent the defendant's escape, or protect the public. State v. Wright, 82 N.C. App. 450, 346 S.E.2d 510 (1986).

**But a defendant is entitled to appear at trial free from bonds or shackles except in extraordinary instances.** State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

**In the absence of a showing of necessity therefor, compelling the defendant to stand trial while shackled is inherently prejudicial** in that it so infringes upon the presumption of innocence that it interferes with a fair and just decision of the question of guilt or innocence. State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

**Burden of Showing Necessity for Shackles on State.** — Because of the inherent prejudice engendered by the use of shackles, the rule since the earliest cases has been that the burden of showing necessity for such measures rests upon the State. State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

**The rule against shackling is subject to the exception** that the trial judge, in the exercise of his sound discretion, may require the accused to be shackled when such action is necessary to prevent escape, to protect others in the courtroom or to maintain order during trial. State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

**Judicial Discretion in Shackling Defendant.** — The power to order a defendant to stand trial while handcuffed or shackled calls for a meaningful exercise of judicial discretion. State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

**Reasons for Shackling to Be on Record.** — When the trial judge, in jury cases, contemplates the necessity of employing unusual visible security measures such as shackles, he should state for the record, out of the presence of the jury, the particular reasons therefor and give counsel an opportunity to voice objections and persuade the court that such measures are unnecessary. State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

**Jury Instruction when Defendant Is Shackled.** — In any case where the trial judge, in the exercise of sound discretion, determines that the defendant must be handcuffed or shackled, it is of the essence that he instruct the jury in the clearest and most emphatic terms that it must give such restraint no consideration whatever in assessing the proofs and determining guilt. State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

**Objection to Shackling Required for Appeal.** — Defendant, while ordinarily constitutionally entitled to appear at his own trial free of shackles, must, when shackling is suggested, object to the proposed restraint, and absent reasonable excuse therefor, his failure to do so will ordinarily preclude the shackling from being an issue on appeal. State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

**Test on Appeal.** — The propriety of physical restraints on an accused depends upon the particular facts of each case, and the test on appeal is whether, under all the circumstances, the trial court abused its discretion. State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

**The trial court did not err in ordering that defendant be restrained** in the courtroom by the use of shackles, where the evidence tended to show that defendant was charged with crimes of violence; he was 29 years old and apparently in good health; other serious charges were pending against him, including an appeal from a conviction the previous week for which he had received a 40 to 50 year prison sentence; only one deputy was available to serve as bailiff and provide security in the courtroom; and there was an outstanding warrant against him charging him with escape from another jurisdiction. State v. Billups, 301 N.C. 607, 272 S.E.2d 842 (1981).

### J. Punishment.

**Death Penalty.** — The North Carolina Supreme Court reaffirmed its position that the North Carolina death penalty statute does not violate the U.S. Const., Amends. VIII and XIV and the N.C. Const., Art. I, § 27 and this section. State v. McHone, 334 N.C. 627, 435 S.E.2d 296 (1993), cert. denied, 511 U.S. 1046, 114 S. Ct. 1577, 128 L. Ed. 2d 220 (1994).

**When punishment does not exceed the limits fixed by statute, it cannot be considered cruel and unusual** punishment in a constitutional sense. State v. Jenkins, 292 N.C. 179, 232 S.E.2d 648 (1977).

**Punishment When Person Is Without Knowledge of Facts Making Act Criminal — In General.** — It is not a violation of due process to punish a person for certain crimes related to the public welfare or safety, even when the person is without knowledge of the facts making the act criminal, and this is particularly so when the controlling statute does not require the act to have been done knowingly or willfully. Watson Seafood & Poultry Co. v. George W. Thomas, Inc., 289 N.C. 7, 220 S.E.2d 536 (1975).

**Same — For Petty Offenses Only.** — The due process rule permitting punishment for certain crimes related to public welfare or safety, even when persons convicted of these crimes are without knowledge of the facts making the act criminal, is not to be extended beyond petty offenses involving light punishment nor to any crime involving moral delinquency. Watson Seafood & Poultry Co. v. George W. Thomas, Inc., 289 N.C. 7, 220 S.E.2d 536 (1975).

**Same — Such as Violations of Motor Vehicle Laws.** — The basis for the inclusion of violations of motor vehicle and traffic laws within the scope of the due process rule permitting punishment of persons for certain crimes related to public welfare or safety, even when such persons are without knowledge of the facts making an act criminal, is that (1) the requirement of proving intent or guilty knowledge would make it impossible to enforce such laws in view of the tremendous number of petty offenses growing out of the host of motor vehicles upon the roads, and (2) the punishments for such violations are usually a small fine. Watson Seafood & Poultry Co. v. George W. Thomas, Inc., 289 N.C. 7, 220 S.E.2d 536 (1975).

**Imposition of Punishment in Excess of that Imposed by Inferior Court.** — Upon appeal from an inferior court for a trial de novo in the superior court, the superior court may impose punishment in excess of that imposed in the inferior court, provided the punishment imposed does not exceed the statutory maximum. State v. Morris, 275 N.C. 50, 165 S.E.2d 245 (1969); State v. Harrell, 281 N.C. 111, 187 S.E.2d 789 (1972).

The fact that defendant received a greater sentence in the superior court than he received in the recorder's court did not constitute a violation of his constitutional or statutory rights. State v. Morris, 275 N.C. 50, 165 S.E.2d 245 (1969).

**Imposition on defendant of two concurrent terms of life imprisonment** for kidnapping and first-degree rape did not violate defendant's equal protection rights on grounds that other persons involved in the same offenses received lesser punishments. State v. Squire, 302 N.C. 112, 273 S.E.2d 688 (1981).

**Imposition of a 30-year sentence for a habitual felon** who under the facts could have received a maximum sentence of life imprisonment under G.S. 14-1.1 is within constitutional limits and does not constitute cruel and unusual punishment. State v. Aldridge, 76 N.C. App. 638, 334 S.E.2d 107 (1985).

**General statistical studies of the operation of the death penalty** showing that a person is more likely to be executed if the murder victim is white and the chance is more likely yet if the defendant is black, could not be used by defendant to show a violation of his rights under U.S. Const., Amends. VIII and XIV or under this section. State v. Green, 329 N.C. 686, 406 S.E.2d 852 (1991).

## V. JUVENILE PROCEEDINGS.

**Applicability of Double Jeopardy Provisions.** — Juvenile proceedings in this State do more than merely determine the delinquency of the minor; they may result in severe curtailment of his freedom and, in some cases, in institutional commitment. Although distinctions between juvenile proceedings and criminal prosecutions do still exist, they are sufficiently similar in nature that the double jeopardy provisions of the United States and North Carolina Constitutions are applicable to them. Accordingly, jeopardy attaches to the initial petition once an adjudicatory hearing on the merits is held. In re Drakeford, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

**Right to Counsel.** — In order to comply with due process in a juvenile delinquency proceeding, the right of the juvenile to be represented by an attorney must be considered and an attorney must be provided or there must be a proper waiver of his right. In re Walker, 14 N.C. App. 356, 188 S.E.2d 731, aff'd, 282 N.C. 28, 191 S.E.2d 702 (1972).

**Transfer Hearing.** — Where the district court held a preliminary hearing, determined whether there was probable cause to believe juveniles guilty, and transferred the case to the superior court, in substance, though not in form, the court complied with the requirements of this section. In re Bullard, 22 N.C. App. 245, 206 S.E.2d 305, appeal dismissed, 285 N.C. 758, 209 S.E.2d 279 (1974).

**Length of Period Committed to Custody of State.** — There is a rational basis for the legislature's disparate treatment of adults and children, and therefore, statute was not unconstitutionally applied to a juvenile in derogation of her equal protection rights, notwithstanding that she was committed to the custody of the state for longer than the period for which an adult could have been imprisoned for her conduct, i.e., unauthorized use of a motor vehicle. In re Allison, 143 N.C. App. 586, 547 S.E.2d 169, 2001 N.C. App. LEXIS 329 (2001).

## VI. POLICE POWER.

**Dividing Line Between Police Power of State and Liberty of Individual.** — The police power of the State extends to all the compelling needs of the public health, safety, morals and general welfare. Likewise, the liberty protected by the law of the land clause of the State Constitution extends to all fundamental rights of the individual. It is the function of the courts to establish the location of the dividing line between the two. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

**Any exercise by the State of its police power is a deprivation of liberty.** In re Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

**For What Purposes Police Power May Be Exercised.** — The State possesses the police power in its capacity as a sovereign, and in the exercise thereof, the legislature may enact laws, within constitutional limits, to protect or promote the health, morals, order, safety and general welfare of society. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

**Effect of Changed Conditions.** — In determining the validity of an exercise of the police power, changed conditions as they arise may bring the subject matter in question within the approved testing principle of reasonableness or may remove it therefrom. Southern Ry. v. City of Winston-Salem, 4 N.C. App. 11, 165 S.E.2d 751, aff'd, 275 N.C. 465, 168 S.E.2d 396 (1969).

**Police Regulation Can Only Be Justified by Public Interest.** — Police regulation of the use or enjoyment of property rights can only be justified by the presence of a public interest, and such property rights may be limited only to the extent necessary to subserve the public interest. Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970), overruled on other grounds in State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

**The limit of the police power is the reasonable necessity for the action** in order to protect the public. Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970), overruled on other grounds in State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

If a statute is to be sustained as a legitimate exercise of the police power, it must have a rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare. In re Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973); North Carolina Ass'n of Licensed Detectives v. Morgan, 17 N.C. App. 701, 195 S.E.2d 357 (1973); In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

**And Is a Question of Degree and of Reasonableness.** — Whether a statute is a violation of the law of the land clause or is a valid exercise of the police power is a question of degree and of reasonableness in relation to the public good likely to result from it. North Carolina Ass'n of Licensed Detectives v. Morgan, 17 N.C. App. 701, 195 S.E.2d 357 (1973).

**Test of Validity.** — When the exercise of the police power is challenged on constitutional grounds, the validity of the police regulation primarily depends on whether, under all the surrounding circumstances and particular facts of the case, the regulation is reasonably calculated to accomplish a purpose falling within the police power without burdening unduly the person or corporation affected. Southern Ry. v. City of Winston-Salem, 4 N.C. App. 11, 165 S.E.2d 751, aff'd, 275 N.C. 465, 168 S.E.2d 396 (1969).

**This section and N.C. Const., Art. I, § 1 permit the State, through the exercise of its police power, to regulate economic enterprises,** provided the regulation is rationally related to a proper governmental purpose. This is the test used in determining the validity of state regulation of business under N.C. Const., Art. I, § 1 and 19. Poor Richard's, Inc. v. Stone, 322 N.C. 61, 366 S.E.2d 697 (1988).

**Legislature may make the doing of an act a criminal offense.** — As a matter of both State and federal constitutional law, legislatures may make the doing of an act a criminal offense even in the absence of criminal intent. State v. Smith, 90 N.C. App. 161, 368 S.E.2d 33 (1988), aff'd, 323 N.C. 703, 374 S.E.2d 866, cert. denied, 490 U.S. 1100, 109 S. Ct. 2453, 104 L. Ed. 2d 1007 (1989).

**Zoning regulations must pass a two-pronged test** in order to comply with substantive due process. First, the regulation must be designed to achieve objectives within the scope of the police power. Second, it must seek to achieve those objectives by reasonable means. Whether the means are reasonable depends on their promotion of the public good and their reasonably minimal interference with the property owner's right to use his property as he deems appropriate. Goodman Toyota, Inc. v. City of Raleigh, 63 N.C. App. 660, 306 S.E.2d 192 (1983), cert. denied, 310 N.C. 477, 312 S.E.2d 884 (1984).

The fact that a lot would be more valuable if devoted to a nonconforming use does not deprive the owner of property without due process of law when zoning regulations are uniform in their application to all within the respective districts, and when the differentiation of the uses of property within the respective districts is in accordance with a comprehensive plan in the interest of the health, safety, morals or general welfare of the entire community. Kinney v. Sutton, 230 N.C. 404, 53 S.E.2d 306 (1949).

**The lawmaking authorities may not, under the guise of police power, impose restrictions which are unnecessary** and unreasonable upon the use of private property. Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970), overruled on other grounds in State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

**The police power does not include power arbitrarily to invade property rights.** Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970), overruled on other grounds in State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

**Method of Implementation of Police Power.** — Although the object of particular legislation may well be within the scope of the police power, the legislation may yet deprive individuals of due process of law if the means chosen to implement the legislative objective are unreasonable. A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

**Limitations on Use of Private Property.** — The police power of the State, which it may delegate to its municipal corporations, extends to the prohibition of a use of private property which may reasonably be deemed to threaten the public health, safety or morals or the general welfare, and when necessary to safeguard such public interest, it may be exercised, without payment of compensation to the owner, even though the property is thereby rendered substantially worthless. Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970), overruled on other grounds in State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982); Harrell v. City of Winston-Salem, 22 N.C. App. 386, 206 S.E.2d 802, cert. denied, 285 N.C. 757, 209 S.E.2d 281 (1974).

The "vested rights" doctrine has evolved as a constitutional limitation on the State's exercise of its police power to restrict an individual's use of private property by the enactment of zoning ordinances; the doctrine is rooted in the "due process of law" and the "law of the land" clauses of the federal and State Constitutions. Godfrey v. Zoning Bd. of Adjustment, 317 N.C. 51, 344 S.E.2d 272 (1986).

**Pesticide Regulations.** — Buffer zone regulations prohibiting the deposit of pesticides within an enumerated distance of certain structures and areas were rationally related to the legitimate legislative goal of protecting people and the environment from risks associated with pesticide use. Meads v. North Carolina Dep't of Agric., 349 N.C. 656, 509 S.E.2d 165 (1998).

**Regulation of Property Based on Aesthetic Considerations Is Permitted.** — Reasonable regulation of property based on aesthetic considerations may constitute a valid basis for the exercise of the police power, depending on the facts and circumstances of each case. Previous cases are overruled to the extent that they prohibited regulation based upon aesthetic considerations alone. State. v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

Regulation based on aesthetic considerations may constitute a valid basis for the exercise of the police power depending on the facts and circumstances of each case. When other worthwhile objectives are also realized (for example, improvement of traffic safety and the protection of property values) the challenged regulation will be deemed to be within the range of permissible purposes properly achieved through use of the police power. Goodman Toyota, Inc. v. City of Raleigh, 63 N.C. App. 660, 306 S.E.2d 192 (1983), cert. denied, 310 N.C. 477, 312 S.E.2d 884 (1984).

**But Such Power Is Not Delegable by Localities to Subordinate Groups.** — Local legislative bodies charged with the responsibility for and the exercise of the police power in the promulgation of property regulations based solely upon aesthetic considerations should not delegate such responsibility to subordinate groups or organizations which are not authorized by the General Assembly to exercise the police power. State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

**Test for Regulation of Property Based on Aesthetic Considerations.** — The diminution in value of an individual's property should be balanced against the corresponding gain to the public from such regulation. Some of the factors which should be considered and weighed in applying such a balancing test include such private concerns such as whether the regulation results in confiscation of the most substantial part of the value of the property or deprives the property owner of the property's reasonable use, and such public concerns as the purpose of the regulation and the manner of achieving a permitted purpose. State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

Aesthetic regulations may provide corollary benefits to the general community such as protection of property values, promotion of tourism, indirect protection of health and safety, preservation of the character and integrity of the community, and promotion of the comfort, happiness, and emotional stability of area residents. Such corollary community benefits would be factors to be considered in balancing the public interests in regulation against the individual property owner's interest in the use of his property free from regulation. The test focuses on the reasonableness of the regulation by determining whether the aesthetic purpose to which the regulation is reasonably related outweighs the burdens imposed on the private property owner by the regulation. State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

An ordinance is a reasonable use of the police power if the aesthetic purpose outweighs the burdens imposed on the private property owner. Goodman Toyota, Inc. v. City of Raleigh, 63 N.C. App. 660, 306 S.E.2d 192 (1983), cert. denied, 310 N.C. 477, 312 S.E.2d 884 (1984).

**Exterior Appearance of Historic Structures.** — The police power encompasses the right to control the exterior appearance of private property when the object of such control is the preservation of the State's legacy of historically significant structures. A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

**Public necessity is the limit of the right to destroy property** which is a menace to public safety or health, and the property cannot be destroyed if the conditions which make it a menace can be abated in any other recognized way. Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970), overruled on other grounds in State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

**Demolition of House for Nonconformity with City Housing Code.** — An action by a municipality, pursuant to an ordinance adopted under the authority of former G.S. 160-182, in ordering the demolition of a dwelling house without compensation to the owner thereof, and in charging the expense of demolition to the owner upon his failure to demolish the house himself, such action being based upon findings by the city building inspector that the house was unfit for human habitation and that the repairs necessary to bring the house into conformity with the housing code would cost 60% or more of the present value of the house, was violative of the Constitution of this State, where (1) the house could be repaired so as to comply with the housing code, and (2) the owner was not afforded a reasonable opportunity to repair the house. Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970), overruled on other grounds in State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

Where it appears from the findings of a city housing commission that a house can be repaired so as to comply with the city's housing code, be suitable for human habitation and be no longer a threat to public health, safety, morals or general welfare, to require its destruction without giving the owner a reasonable opportunity thus to remove the existing threat to the public health, safety and welfare is arbitrary and unreasonable. Such power may not be delegated to or exercised by a municipal corporation of this State by reason of this section. Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970), overruled on other grounds in State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

A homeowner who is faced with a municipal housing inspector's order giving him no alternative but to demolish his home, which has been declared uninhabitable by the municipality, or to pay the expense of a demolition by the municipality, is not required to propose an alternative remedy for the condition of the house before asserting his constitutional right in the courts. Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970), overruled on other grounds in State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

**Sign Ordinance.** — An ordinance which limits the number of signs in a municipality and prevents the use of temporary and wind-blown signs except under certain specified circumstances was held reasonable. Goodman Toyota, Inc. v. City of Raleigh, 63 N.C. App. 660, 306 S.E.2d 192 (1983), cert. denied, 310 N.C. 477, 312 S.E.2d 884 (1984).

### VII. TAKING OF PRIVATE PROPERTY FOR PUBLIC USE.

### A. In General.

**Under this section no person may be deprived of his property except by his own consent or the law of the land.** Eason v. Spence, 232 N.C. 579, 61 S.E.2d 717 (1950).

This section provides that no person may be deprived of his property except by the law of the land, that is, except by due process of law. Parker v. Stewart, 29 N.C. App. 747, 225 S.E.2d 632 (1976).

Although the North Carolina Constitution does not contain an express provision prohibiting the taking of private property for public use without payment of just compensation, the Supreme Court has inferred such a provision as a fundamental right integral to the law of the land clause. Messer v. Town of Chapel Hill, 125 N.C. App. 57, 479 S.E.2d 221 (1996).

**Conclusive Presumption of Statute Deprives Property Owner of Due Process.** — The first sentence of subsection (b) of G.S. 1-44.2 that provides that persons claiming contrary to the presumption of subsection (a) must bring a lawsuit within one year of the enactment of the statute or the abandonment of the easement, whichever occurs later, or lose their right to rebut the presumption, turns a rebuttable presumption into a conclusive presumption which effectively takes a defendants' property without affording notice, an opportunity to be heard and just compensation. McDonald's Corp. v. Dwyer, 338 N.C. 445, 450 S.E.2d 888 (1994).

**Prohibition Against Taking Private Property Without Just Compensation Is Inferred As Fundamental Right.** — Although the North Carolina Constitution does not contain an express provision prohibiting the taking of private property for public use without payment of just compensation, such a provision is inferred as a fundamental right integral to the "law of the land" clause in N.C. Const., Art. I, § 19. Piedmont Triad Reg'l Water Auth. v. Unger, 154 N.C. App. 589, 572 S.E.2d 832, 2002 N.C. App. LEXIS 1529 (2002), cert. denied, 357 N.C. 165, 580 S.E.2d 695 (2003).

**Prohibitions Apply to All Three Branches of Government.** — The constitutional prohibitions against the taking of private property without due process of law limit the powers of the executive and judicial branches as well as the legislative branch. In re Kenan, 261 N.C. 1, 134 S.E.2d 85 (1964).

**Test to Determine Whether Taking Has Occurred.** — The test to determine whether a taking of private property for public use has occurred involves as two-part analysis. An "ends-means" test is applied to decide whether that particular exercise of the police power was legitimate, by determining whether the ends sought, i.e., the object of the legislation, is within the scope of the power, and then whether the means chosen to regulate are reasonable. Finch v. City of Durham, 325 N.C. 352, 384 S.E.2d 8, rehearing denied, 325 N.C. 714, 388 S.E.2d 452 (1989).

**The test for determining whether a taking has occurred in the context of a rezoning** is whether the property as rezoned has a practical use and a reasonable value. Finch v. City of Durham, 325 N.C. 352, 384 S.E.2d 8, rehearing denied, 325 N.C. 714, 388 S.E.2d 452 (1989).

**What Persons Are Protected by Limitation on Taking Property.** — The constitutional limitation against taking of property of a citizen affords the same protection to a mentally ill person that it affords to a person of sound mind. In re Kenan, 261 N.C. 1, 134 S.E.2d 85 (1964).

**Applicability to Interest and Principal.** — The constitutional provision that no person shall be deprived of his property except by the law of the land applies to interest or earnings on funds in the same manner as it applies to principal. McMillan v. Robeson County, 262 N.C. 413, 137 S.E.2d 105 (1964).

**Zoning restrictions on property may be so strict as to amount to a taking** of that property. However, for there to be such a "taking," the restriction must deprive the owner of virtually all the beneficial uses of his land. Sherrill v. Town of Wrightsville Beach, 81 N.C. App. 369, 344 S.E.2d 357, cert. denied and appeal dismissed, 318 N.C. 417, 349 S.E.2d 600 (1986).

**Power of Eminent Domain Is Inherent in Sovereignty.** — The power of eminent domain, that is, the right to take private property for public use, is inherent in sovereignty. This section requires payment of fair compensation for the property so taken. This is the only limitation imposed on sovereignty with respect to taking. Town of Morganton v. Hutton & Bourbonnais Co., 251 N.C. 531, 112 S.E.2d 111 (1960).

The power of eminent domain is one of the attributes of a sovereign state. Redevelopment Comm'n v. Hagins, 258 N.C. 220, 128 S.E.2d 391 (1962).

The right to take private property for public use exists independently of constitutional provisions. In fact, such provisions are limitations on the State's power to exercise the right. Redevelopment Comm'n v. Hagins, 258 N.C. 220, 128 S.E.2d 391 (1962).

**The exercise of the power of eminent domain by a corporation** authorized by its charter to generate and sell electricity and given the power of eminent domain to acquire the necessary rights-of-way and lands for its dams cannot be said to be an exercise of this power in a private capacity in contravention of this section. Whiting Mfg. Co. v. Carolina Aluminum Co., 207 N.C. 52, 175 S.E. 698 (1934).

**Exercise of Eminent Domain by Park Commission.** — The exercise of the power of eminent domain by the North Carolina National Park Commission under Public Laws 1927, c. 48, is not contrary to the "due process" clause of the State Constitution. Yarborough v. North Carolina Park Comm'n, 196 N.C. 284, 145 S.E. 563 (1928). See also, Suncrest Lumber Co. v. North Carolina Park Comm'n, 30 F.2d 121 (W.D.N.C. 1929), appeal dismissed, 280 U.S. 615, 50 S. Ct. 13, 74 L. Ed. 656 (1929).

Only those whose interests in the particular lands sought to be taken for the national park contemplated by Public Laws 1927, c. 48, § 27, may sue in equity for injunctive relief on the ground that their lands are about to be taken contrary to the provisions of U.S. Const., Amend. XIV and of this section. Yarborough v. North Carolina Park Comm'n, 196 N.C. 284, 145 S.E. 563 (1928).

**As to the exercise of eminent domain by county commission,** see Hill v. Board of Comm'rs, 190 N.C. 123, 129 S.E. 154 (1925).

**Maintenance of Nuisance Is a Taking.** — A nuisance maintained by a governmental agency impairing private property is a taking in the constitutional sense. Midgett v. North Carolina State Hwy. Comm'n, 260 N.C. 241, 132 S.E.2d 599 (1963), overruled on other grounds in Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

**Deprivation of Previously Available Property Rights.** — A taking does not occur simply because government action deprives an owner of previously available property rights. Finch v. City of Durham, 325 N.C. 352, 384 S.E.2d 8, rehearing denied, 325 N.C. 714, 388 S.E.2d 452 (1989).

**Riparian rights are vested property rights** that cannot be taken for private purposes or taken for public purposes without compensating the owner, and they arise out of ownership of land bounded or traversed by navigable water. In re Mason ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 27 (1986).

**Lease for shellfish cultivation issued under § 113-202 did not infringe upon riparian rights** of landowner. In re Mason ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 27 (1986).

**Entry Before Bringing Proceedings.** — The statute, authorizing the State Highway Commission (now Department of Transportation) to enter upon and take possession of lands before bringing condemnation proceedings and before making compensation, is not an infraction of constitutional rights and does not deprive an owner of notice and opportunity to be heard. North Carolina State Hwy. Comm'n v. Young, 200 N.C. 603, 158 S.E. 91 (1931).

**Statute Providing For Access and Maintenance of Grave Not Unconstitutional.** — G.S. 65-75 [repealed] was a proper exercise of a police power and therefore not subject to the constitutional and fundamental provision that private property was not to be taken for a public use without just compensation. Massey v. Hoffman, 184 N.C. App. 731, 647 S.E.2d 457, 2007 N.C. App. LEXIS 1595 (2007), appeal dismissed, review denied, 362 N.C. 360, 662 S.E.2d 907 (2008).

### B. Public Use.

**Property May Be Taken Only for Public Use.** — Private property may be taken by exercise of the power of eminent domain only where the taking is for a public use. North Carolina State Hwy. Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

To take property without the owner's consent for a nonpublic use, even if he is paid its full value, is a violation of this section and of the due process clause of U.S. Const., Amend. XIV. State Hwy. Comm'n v. Thornton, 271 N.C. 227, 156 S.E.2d 248 (1967), commented on in 46 N.C.L. Rev. 663 (1968); North Carolina State Hwy. Comm'n v. Asheville School, Inc., 5 N.C. App. 684, 169 S.E.2d 193 (1969), aff'd, 276 N.C. 556, 173 S.E.2d 909 (1970).

**What is a "public use"** justifying the exercise of the power of eminent domain cannot be stated with precision for all cases. Each case must be evaluated in the light of its peculiar circumstances and the then current opinion as to the proper function of government. State Hwy. Comm'n v. Thornton, 271 N.C. 227, 156 S.E.2d 248 (1967), commented on in 46 N.C.L. Rev. 663 (1968).

In a declaratory judgment action challenging a city's condemnation proceeding for expansion of the city's sewer system, a judgment for the city was proper because the intended use of the condemnation satisfied the public use and public benefit test as all city residents, including the landowners whose property was being condemned, would have the equal right to connect to the expanded sewer system, which was an essential service. Tucker v. City of Kannapolis, 159 N.C. App. 174, 582 S.E.2d 697, 2003 N.C. App. LEXIS 1442 (2003).

**Public and Private Roads Distinguished.** — Although a road may be called a public road by the governmental agency which builds it, if, in reality, it is by its very nature and location to be used only by one family or corporation, save for occasional incidental use by visitors, it is not a public road, and the property of another person cannot be taken for its construction under the power of eminent domain. State Hwy. Comm'n v. Thornton, 271 N.C. 227, 156 S.E.2d 248 (1967), commented on in 46 N.C.L. Rev. 663 (1968).

A road used by large numbers of people to reach their place of employment and by many others to reach the place at which they will transact business cannot be said to be a private road for the sole benefit of the proprietor whose plant is located at its terminus. State Hwy. Comm'n v. Thornton, 271 N.C. 227, 156 S.E.2d 248 (1967), commented on in 46 N.C.L. Rev. 663 (1968).

**Economic benefits to the community,** anticipated from the attraction to it of a large and wealthy prospective employer, are not determinative of whether property taken in order to accomplish that purpose is taken for a "public use." The home or other property of a poor man cannot be taken from him by eminent domain and turned over to the private use of a wealthy individual or corporation merely because the latter may be expected to spend more money in the community, even though he or it threatens to settle elsewhere if this is not done. This the Constitution forbids. State Hwy. Comm'n v. Thornton, 271 N.C. 227, 156 S.E.2d 248 (1967), commented on in 46 N.C.L. Rev. 663 (1968).

**Property May Not Be Taken for Unlawful Purpose.** — The land of a person may not be taken, without his consent, when the purpose, which would otherwise authorize the taking, cannot be accomplished as a matter of law. Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967).

For a county to take land from the owners without their consent for a use incidental to a proposed airport, which airport the county may not lawfully construct and operate, would be a vain and utterly useless deprivation of the landowners' rights in their property, and such an arbitrary, capricious taking of their land would be a violation of this section. Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967).

**Limitation on Use of Property Taken.** — A sanitary district acting under statute to acquire easements to construct and maintain sanitary sewer lines can use the property taken for only the limited purpose described in the petition, and any other use by it or anyone else would require additional compensation. North Asheboro-Central Falls San. Dist. v. Canoy, 252 N.C. 749, 114 S.E.2d 577 (1960).

### C. Compensation.

**Just Compensation Is Required When Private Property Is Taken.** — Private property may not be taken even for a public use without compensation. McKinney v. Deneen, 231 N.C. 540, 58 S.E.2d 107 (1950).

The constitutional prohibitions against the taking of private property except by due process of law preclude the legislature from sanctioning the taking of a person's property except in satisfaction of a legal obligation or for a public purpose upon the payment of just compensation. In re Kenan, 261 N.C. 1, 134 S.E.2d 85 (1964).

The exercise of the power to condemn land for public use is always subject to the principle that there must be definite and adequate provisions made for reasonable compensation to the owner. City of Raleigh v. Mercer, 271 N.C. 114, 155 S.E.2d 551 (1967).

**As Part of the Law of the Land.** — The principle that when private property is taken for public use just compensation must be paid is deeply imbedded in constitutional law, and while the principle is not stated in express terms in the State Constitution, it is regarded as an integral part of "the law of the land." Eller v. Board of Educ., 242 N.C. 584, 89 S.E.2d 144 (1955); Sale v. State Hwy. & Pub. Works Comm'n, 242 N.C. 612, 89 S.E.2d 290 (1955); Town of Morganton v. Hutton & Bourbonnais Co., 251 N.C. 531, 112 S.E.2d 111 (1960); Finch v. City of Durham, 325 N.C. 352, 384 S.E.2d 8, rehearing denied, Revco Southeast Drug Centers, Inc. v. North Carolina Bd. of Pharmacy, 21 N.C. App. 156, 204 S.E.2d 38 (1974).

The principle forbidding the taking of private property for public use without just compensation is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina. Yancey v. North Carolina State Hwy. & Pub. Works Comm'n, 222 N.C. 106, 22 S.E.2d 256 (1942).

North Carolina does not have an express constitutional provision against the taking of private property for public use without the payment of just compensation. However, North Carolina recognizes this fundamental right to just compensation as so grounded in natural law and justice that it is part of the fundamental law of the State, and imposes upon a governmental agency taking private property for public use a correlative duty to make just compensation to the owner of the property taken. This principle is considered in North Carolina as an integral part of "the law of the land" within the meaning of this section. DeBruhl v. State Hwy. & Pub. Works Comm'n, 247 N.C. 671, 102 S.E.2d 229 (1958).

In the exercise of the power of eminent domain, private property may be taken only for a public purpose, or more properly speaking, a public use, upon payment of just compensation. This principle is so grounded in natural equity that it has never been denied to be an essential part of "the law of the land" within the meaning of this section. Redevelopment Comm'n v. Security Nat'l Bank, 252 N.C. 595, 114 S.E.2d 688 (1960).

North Carolina is the only state in the nation that does not have an express constitutional provision against the "taking" or "damaging" of private property for public use without compensation. Nevertheless, the principle is recognized as a fundamental right and is considered an integral part of the "law of the land" within the meaning of this section. Stillings v. City of Winston-Salem, 63 N.C. App. 618, 306 S.E.2d 489 (1983), rev'd on other grounds, 311 N.C. 689, 319 S.E.2d 233 (1984).

While N.C. Const., Art. I, § 19 does not expressly prohibit taking property without compensation, this right is nevertheless considered a part of the "law of the land" under the amendment. Armstrong v. Armstrong, 85 N.C. App. 93, 354 S.E.2d 350, rev'd on other grounds, 322 N.C. 396, 368 S.E.2d 595 (1988).

**And As Guaranteed by This Section.** — This section guarantees payment of compensation by sovereign authority. Braswell v. State Hwy. & Pub. Works Comm'n, 250 N.C. 508, 108 S.E.2d 912 (1959); Midgett v. North Carolina State Hwy. Comm'n, 260 N.C. 241, 132 S.E.2d 599 (1963), overruled on other grounds in Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

The private property of a citizen cannot be taken for a public use by the State or by a municipal corporation without the payment of just compensation. This legal requirement is guaranteed by this section. Carolina Beach Fishing Pier v. Town of Carolina Beach, 274 N.C. 362, 163 S.E.2d 363 (1968).

There is a fundamental right to just compensation, grounded in natural law and justice, that is part of the fundamental law of this State, which imposes upon a governmental agency taking private property for public use the duty to make just compensation to the owner of the property taken. This principle is considered in this section. Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982).

**And by the Federal Constitution.** — The requirement that just compensation be paid for land condemned for a public use is guaranteed both by the federal Constitution and this section. City of Raleigh v. Mercer, 271 N.C. 114, 155 S.E.2d 551 (1967).

North Carolina recognizes the fundamental right to just compensation as so grounded in natural law and justice that it is part of the fundamental law of this State, and imposes upon a governmental agency taking private property for public use a correlative duty to make just compensation to the owner of the property taken. This principle is considered in North Carolina as an integral part of the law of the land within the meaning of this section. The requirement that just compensation be paid for land taken for a public use is likewise guaranteed by U.S. Const., Amend. XIV. Department of Transp. v. Harkey, 308 N.C. 148, 301 S.E.2d 64 (1983).

**And This Requirement Is Self-Executing.** — The constitutional prohibition against taking the private property of a citizen for public use without the payment of just compensation is self-executing and is not subject to impairment by legislation. Carolina Beach Fishing Pier v. Town of Carolina Beach, 274 N.C. 362, 163 S.E.2d 363 (1968).

The constitutional prohibition against taking or damaging private property for public use without just compensation is self-executing, and neither requires any law for its enforcement nor is susceptible of impairment by legislation. Midgett v. North Carolina State Hwy. Comm'n, 260 N.C. 241, 132 S.E.2d 599 (1963), overruled on other grounds in Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

While this State does not have an express constitutional provision against the "taking" or "damaging" of private property for public use without payment of just compensation, recovery is allowed for a taking on constitutional as well as on common law principles. Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982).

**Thus a citizen may sue the State or one of its subdivisions,** namely, a municipality, for taking his private property for a public purpose under the Constitution where no statute affords an adequate remedy. Carolina Beach Fishing Pier v. Town of Carolina Beach, 274 N.C. 362, 163 S.E.2d 363 (1968).

The prohibition against the taking of private property for a public use without just compensation is self-executing, and when no statute provides a procedure to recover compensation under the circumstances of the taking, the owner may maintain an action to obtain just compensation therefor. Guilford Realty & Ins. Co. v. Blythe Bros. Co., 260 N.C. 69, 131 S.E.2d 900 (1963).

**Taking Property Without Compensation.** — While N.C. Const., Art. I, § 19 does not expressly prohibit taking property without compensation, this right is nevertheless considered a part of the "law of the land" under the amendment. Armstrong v. Armstrong, 85 N.C. App. 93, 354 S.E.2d 350, rev'd on other grounds, 322 N.C. 396, 368 S.E.2d 595 (1988).

**Governmental Immunity Not a Defense to Liability for Compensation.** — If a "taking" has occurred, it is compensable, even though it results from a function which is governmental in nature. Governmental immunity is not a defense where there is a "taking" of private property for public use, whether that use is proprietary or governmental in nature. The test of liability is whether, notwithstanding its acts are governmental in nature and for a lawful public purpose, the municipality's acts amount to a partial taking of private property. If so, just compensation must be paid. Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982).

**Rejection of Property After Taking.** — To permit the Highway Commission (now Department of Transportation) to decide, subsequent to a taking, that it did not want the property it had taken, and for that reason to refuse to pay, would do violence to the provisions of this section. North Carolina State Hwy. Comm'n v. York Indus. Center, 263 N.C. 230, 139 S.E.2d 253 (1964).

**Damages for Delay in Payment.** — Petitioners, whose property had been taken for public use by an agency of the State government, and who had been physically dispossessed and ejected therefrom by a court order, were entitled to have the jury award them as compensation not only the fair market value of their property as of the date of the taking, but also some additional sum for the substantial delay in the payment of the fair market value of their property so taken, as an element of the just compensation guaranteed by this section. DeBruhl v. State Hwy. & Pub. Works Comm'n, 247 N.C. 671, 102 S.E.2d 229 (1958).

When the taking of property by the State precedes the payment of compensation, the owner is entitled to additional compensation for the delay in payment. This section and U.S. Const., Amends. V and XIV require this additional payment as a part of just compensation. The additional sum awarded for delay in payment of the value for the property taken is not interest eo nomine, but interest is a fair means for measuring the amount to be arrived at of such additional sums. Lea Co. v. North Carolina Bd. of Transp., 317 N.C. 254, 345 S.E.2d 355 (1986), aff'd, 323 N.C. 697, 374 S.E.2d 866, cert. denied, 490 U.S. 1100, 109 S. Ct. 2453, 104 L. Ed. 2d 1007 (1989).

**City May Compensate for Easements by Agreement to Furnish Fire Protection Outside City Limits.** — A municipality has the authority to compensate landowners for a water and sewer line easement across a tract of land located outside the municipal limits by an agreement to furnish fire protection for any buildings located on such tract. Valevais v. City of New Bern, 10 N.C. App. 215, 178 S.E.2d 109 (1970).

**Property owner's actual investment in property prior to rezoning is not determinative** of practical use and reasonable value of the property after rezoning. Finch v. City of Durham, 325 N.C. 352, 384 S.E.2d 8, rehearing denied, 325 N.C. 714, 388 S.E.2d 452 (1989).

### D. Substitute Condemnation.

**Substitute condemnation** is a transaction in which the State or an agency with the power of eminent domain, A, takes land under an agreement to compensate its owner, B, with land to be taken in condemnation proceedings from a third person, C, instead of with money. North Carolina State Hwy. Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

**There is no denial of due process or other constitutional infirmity in substitute condemnations** where the owner of the land first taken, with whom the ultimate condemnee's land is to be exchanged, also has the power of condemnation and could itself have condemned the land. North Carolina State Hwy. Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

**Public Use and Necessity in Substitute Condemnation.** — In controversies concerning substitute condemnation, the questions of public use and necessity are inseparable. Whether land has been taken for a public use in a substitute condemnation will depend on whether fairness requires that B, whose land has been taken for an undisputed public purpose, be compensated in land and whether there is a close factual connection between the taking of B's land and C's land, taken to compensate B. Whether it is necessary to exercise the power of eminent domain will turn on whether B can be fairly compensated only in land. Whether it is necessary to take C's property depends on whether there is a close factual connection between the two takings. North Carolina State Hwy. Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

Substitute condemnation is a valid exercise of a power of eminent domain only when the substitution of other property is the sole method by which the owner of land taken for public use can be justly compensated, and the practical problems resulting from the taking can be solved. It can only be justified when the property for which land is substituted accomplishes the public purpose for which it was taken, and the cost is not disproportionate to the benefit derived. North Carolina State Hwy. Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

### E. Illustrative Cases.

**Punitive Damages Cap.** — Section 1D-25, placing a cap on an award of punitive damages, did not take property without just compensation, infringing on a fundamental right, because punitive damages are not property belonging to an individual. Rhyne v. K-Mart

Corp., 149 N.C. App. 672, 562 S.E.2d 82, 2002 N.C. App. LEXIS 316 (2002), aff'd, 358 N.C. 160, 594 S.E.2d 1 (2004).

**State Regulation of Public Streets and Beaches.** — Session Laws 1983, Chapter 539 (former G.S. 113A-134.10), which, inter alia, prohibited motor vehicle traffic over a vehicular access ramp and right-of-way constructed by a town to provide access to the beach did not constitute a taking in violation of this Article, since the State has paramount legislature authority to regulate the use and control of public streets and beaches. Town of Emerald Isle ex rel. Smith v. State, 320 N.C. 640, 360 S.E.2d 756 (1987).

**PCB Disposal Facility.** — Plaintiff landowners failed to demonstrate that they were entitled to recover based upon inverse condemnation on account of the State's location and operation of a PCB disposal facility, the buffer zone to which was adjacent to their land. Twitty v. State, 85 N.C. App. 42, 354 S.E.2d 296, cert. denied, 320 N.C. 177, 358 S.E.2d 69 (1987).

**Five-year amortization provisions of county ordinance regulating off-premises signs** of over 15 square feet were sufficient, and the ordinance did not constitute a taking of plaintiff's property without compensation. Summey Outdoor Adv., Inc. v. County of Henderson, 96 N.C. App. 533, 386 S.E.2d 439 (1989).

**Denial of a project application for preliminary plat approval** which would violate the valid condition of a previously approved and substantially undertaken proposal worked no taking of a three-acre area at issue. River Birch Assocs. v. City of Raleigh, 326 N.C. 100, 388 S.E.2d 538 (1990).

**A requirement of dedication of park space for subdivision** approval does not necessarily constitute a taking. Where the subdivider creates the specific need for parks, it is not unreasonable to charge the subdivider with the burden of providing them. River Birch Assocs. v. City of Raleigh, 326 N.C. 100, 388 S.E.2d 538 (1990).

**Application of § 105-116 to Electric Cooperative.** — Section 105-116 taxes billings for electrical service rendered by cooperatives in the same manner as billings for service rendered by investor-owned utilities; therefore, application of that section to electric cooperative did not violate that entity's rights under this section or N.C. Const., Art. V, § 2 and 3. Four County Elec. Membership Corp. v. Powers, 96 N.C. App. 417, 386 S.E.2d 107 (1989), cert. denied and appeal dismissed, 326 N.C. 799, 393 S.E.2d 894 (1990), cert. denied, 498 U.S. 1040, 111 S. Ct. 711, 112 L. Ed. 2d 700 (1991).

**Flow of Sewage onto Land.** — Where sewage disposal device operated by school board was constructed and operated so as to cause sewage to flow or seep onto plaintiffs' land, and by reason of such continuous pollution and the noxious odors emanating continuously therefrom, plaintiffs' spring was rendered unfit for use and their dwelling was rendered unfit for habitation, there was a taking by the school board to the extent of the impairment in value of plaintiffs' land caused thereby. Eller v. Board of Educ., 242 N.C. 584, 89 S.E.2d 144 (1955).

**Appropriation of Private Water Lines by City.** — Appropriation by city of plaintiffs' property to its own use by exercising control and dominion over water lines laid by plaintiffs in territory subsequently included in the extended city limits imposed on the city a duty to pay the fair value of the property taken. Styers v. City of Gastonia, 252 N.C. 572, 114 S.E.2d 348 (1960).

**Easements for Sewer Lines.** — When a sanitary district, in the exercise of its power of eminent domain, took easements and rights-of-way for sewer lines over the lands of defendants, it became obligated by the North Carolina Constitution and by the statute under which it acted to pay to defendants just compensation for the damage done. North Asheboro-Central Falls San. Dist. v. Canoy, 252 N.C. 749, 114 S.E.2d 577 (1960).

**Relocation of Easement.** — Where no written contract existed regarding an easement's relocation and city council had not authorized this relocation, the appellate court took jurisdiction, even though defendants failed to file a timely appeal and found that placement of a sewer line outside an easement constituted a taking as a matter of law. Concrete Mach. Co. v. City of Hickory, 134 N.C. App. 91, 517 S.E.2d 155 (1999).

**Flooding of Land.** — The right to have water flow in the direction provided by nature is a property right, and if such right of a landowner is materially interfered with so that his land is flooded by the manner in which a highway is constructed, it is a nuisance and a taking of property for public use for which compensation must be paid. Midgett v. North Carolina State Hwy. Comm'n, 260 N.C. 241, 132 S.E.2d 599 (1963), overruled on other grounds in Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

**Substitution of Service Road for Direct Access.** — Since the substitution of a service road for direct access theretofore enjoyed by an abutting property owner is an exercise of the police power, any diminution in the value of petitioners' property is damnum absque injuria. Moses v. State Hwy. Comm'n, 261 N.C. 316, 134 S.E.2d 664, cert. denied, 379 U.S. 930, 85 S. Ct. 327, 13 L. Ed. 2d 342 (1964).

**Construction of Barricade Across Street.** — Where the State has authorized the construction of a barricade across a street, thereby closing it to vehicular traffic in one direction, the owner of land abutting the street on the cul-de-sac thus created has not been deprived of his property without due process of law in violation of U.S. Const., Amend. XIV or this section, though the value of his property has been impaired and the State has not compensated him for such loss of value. Wofford v. North Carolina State Hwy. Comm'n, 263 N.C. 677, 140 S.E.2d 376, cert. denied, 382 U.S. 822, 86 S. Ct. 50, 15 L. Ed. 2d 67 (1965).

**Taking of Land to Increase Highway Visibility.** — If, in the interest of public safety at an intersection of highways, greater visibility is required than is afforded by removing obstructions from existing rights-of-way, land necessary to afford such increased view of approaches to the intersection may be taken by the appropriate public authorities under the power of eminent domain, with just compensation for the land so taken paid to the property owner; but the property may not be taken for such purpose, without compensation, under the guise of a regulation of the owner's business pursuant to the police power. State v. Vestal, 281 N.C. 517, 189 S.E.2d 152 (1972).

**Restriction on Location of Fence.** — An ordinance that a fence must be built substantially within the boundaries of a lot in which an automobile wrecking business is located is a taking of the lot owner's property for a public use without compensation. State v. Vestal, 281 N.C. 517, 189 S.E.2d 152 (1972).

**Zoning Ordinance.** — Zoning ordinance which required that owner of building material salvage yard remove his property within three years did not amount to a taking of his property for a public purpose without just compensation where he was notified on several occasions after the expiration of three-year period that he was in violation of the law, but made no effort to comply with the ordinance because he did not think it was fair. State v. Joyner, 286 N.C. 366, 211 S.E.2d 320, appeal dismissed, 422 U.S. 1002, 95 S. Ct. 2618, 45 L. Ed. 2d 666 (1975).

**Removal of Sign.** — In an inverse condemnation suit involving the tearing down of plaintiff's advertisement sign by defendant city, plaintiff's allegation that the sign was removed in the furtherance of the city's purposes, in that the sign was located on or interfered with the possession, control and use of defendant's easements, was sufficient to support the pleading requirement of alleging a taking for a public use or purpose. Schloss Outdoor Adv. Co. v. City of Charlotte, 50 N.C. App. 150, 272 S.E.2d 920 (1980).

**Airplane Overflights.** — For case discussing damages from airplane overflights, see Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982).

**The capture of supplier refunds for the purpose of funding the expansion fund** did not constitute a taking without compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the "law of the land" clause of N.C. Const., Art. I, § 19. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994).

**Insurance Claim Files.** — There was no compensable taking of plaintiff's property where, in order to facilitate the processing of claims made under policies issued by insolvent insurer, association requested the commissioner to obtain access to plaintiff's claim files. Eastern Appraisal Servs., Inc. v. State, 118 N.C. App. 692, 457 S.E.2d 312, appeal dismissed, cert. denied, 341 N.C. 648, 462 S.E.2d 509 (1995).

**Local Property Taxes.** — There was no authority for a property owner's argument that local real property taxes were an unconstitutional taking under U.S. Const. amend. V and N.C. Const., Art. I, § 19. Furthermore, nothing supported his argument that property conveyed by bill of sale was not subject to ad valorem taxation. Sullivan v. Pender County, — N.C. App. —, 676 S.E.2d 69, 2009 N.C. App. LEXIS 526 (2009).

**Award of Interest.** — Where city's placement of sewer line outside of easement constituted a taking without prior payment of compensation, plaintiff was entitled to an award of 14% compound interest, based on a fair and reasonable rate of return for a prudent investor. Concrete Mach. Co. v. City of Hickory, 134 N.C. App. 91, 517 S.E.2d 155 (1999).

**Retention of the interest or income on unclaimed property by the State of North Carolina and its treasurer pursuant to G.S. 116B-64 of the North Carolina Unclaimed Property Act** does not constitute a taking without just compensation in violation of N.C. Const., Art. I, § 19 and the Fifth and Fourteenth Amendments of the United States Constitution. Rowlette v. State, 188 N.C. App. 712, 656 S.E.2d 619, 2008 N.C. App. LEXIS 284 (2008), review denied, appeal dismissed, 362 N.C. 474, 666 S.E.2d 487 (2008).

Property owners whose dividends and funds had been held by the State of North Carolina and its treasurer under G.S. 116B-64 of the North Carolina Unclaimed Property Act could not claim a compensable taking of their property pursuant to N.C. Const., Art. I, § 19 and the Fifth and Fourteenth Amendments of the United States Constitution because the owners' action in failing to make any use of the property at issue, rather than the action of the State, caused the lapse of the property right and the State did not undertake any overt action to take private property from the owners. Rowlette v. State, 188 N.C. App. 712, 656 S.E.2d 619, 2008 N.C. App. LEXIS 284 (2008), review denied, appeal dismissed, 362 N.C. 474, 666 S.E.2d 487 (2008).

**No Defense of Sovereign Immunity Against State Employees' Takings Claim.** — State was not entitled to the defense of sovereign immunity against state employees' takings claim under N.C. Const., Art. I, § 19 because sovereign immunity did not bar the employees' breach of contract claim; therefore, the contract could give rise to an enforceable property right. Carl v. State, — N.C. App. —, 665 S.E.2d 787, 2008 N.C. App. LEXIS 1630 (2008), review denied, cert. denied, 363 N.C. 123 (2009).

**Taking Not Found.** — When a city paid consideration for a sewer line easement to plaintiffs' predecessor in title, and later abandoned the easement and left a sewer pipe in the ground in question, this did not amount to a taking. The city had paid just compensation to the predecessor in title, and plaintiffs were entitled to nothing more. Frances L. Austin Family L.P. v. City of High Point, 177 N.C. App. 753, 630 S.E.2d 37, 2006 N.C. App. LEXIS 1198 (2006).

## VIII. TAXATION.

**Classifications for Tax Purposes — Generally.** — The legislature may levy a sales tax or a tax on the business of selling tangible personal property, levied as a license or privilege tax, and classify trades, callings, and occupations for the imposition of a tax, and classify articles sold as the basis for computing the tax, exempting certain classes of articles and providing a graduated tax as to other classes of articles, or differentiate in the method of collecting the tax as to some of the classes, provided the levy applies equally and uniformly to all who fall within each particular classification, and provided the classifications are reasonable and based upon some real distinction. Leonard v. Maxwell, 216 N.C. 89, 3 S.E.2d 316, appeal dismissed, 308 U.S. 516, 60 S. Ct. 175, 84 L. Ed. 439 (1939). See also, Caldwell Land & Lumber Co. v. Smith, 146 N.C. 199, 59 S.E. 653 (1907).

**Same — Sales Tax.** — The North Carolina law imposes the sales tax on all retailers, as a class, and applies it alike in its exactions and exemptions to all persons belonging to the prescribed class. Piedmont Canteen Serv. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962); Fisher v. Jones, 15 N.C. App. 737, 190 S.E.2d 663 (1972).

Perfect equality in the collection of the sales tax by retailers from consumers is, as a practical matter, impossible as between almost any two or more retailers by reason of the differences in types of merchandise sold and selling methods. Piedmont Canteen Serv. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962); Fisher v. Jones, 15 N.C. App. 737, 190 S.E.2d 663 (1972).

**Same — Exemptions.** — Provisions of sales and use tax making a distinction between wholesale and retail merchants and exempting sales of ice, prescription medicines, fish and farm products when sold in the original or unmanufactured state, commercial fertilizer, agricultural lime and plaster, public school books, sales of used or repossessed articles, and sales to the government or governmental agencies, etc., were held to constitute classifications based upon reasonable and real distinctions. Leonard v. Maxwell, 216 N.C. 89, 3 S.E.2d 316, appeal dismissed, 308 U.S. 516, 60 S. Ct. 175, 84 L. Ed. 439 (1939).

**A sales tax on retailers who sell merchandise through vending machines,** including items sold for less than ten cents where it is impossible to recoup the tax from the purchaser, does not violate constitutional provisions relating to due process and equal protection. Fisher v. Jones, 15 N.C. App. 737, 190 S.E.2d 663 (1972).

**Opportunity to Be Heard.** — The constitutional provisions guaranteeing due process under this section and U.S. Const., Amend. XIV are mandatory and require an opportunity to be heard with respect to asserted tax liability. Kirkpatrick v. Currie, 250 N.C. 213, 108 S.E.2d 209 (1959).

**Creation of Taxing District Without Hearing.** — Former G.S. 131-126.33 et seq., providing for the creation of a taxing district without providing for a hearing on the benefits to be conferred upon the property therein, did not violate this section. Williamson v. Snow, 239 N.C. 493, 80 S.E.2d 262 (1954).

**Statute Providing for Service of Summons by Publication.** — A statute conferring jurisdiction upon the superior courts of the counties over citizens and owners of taxable property within the county without requiring each such owner or citizen to be named as a party in the complaint or summons, and providing for service of summons by publication, did not violate this section. Castevens v. Stanly County, 211 N.C. 642, 191 S.E. 739 (1937).

**Assessments Without Notice Are Void.** — Street assessments made under charter provisions failing to provide notice and an opportunity to be heard to those assessed are void as violating due process of law, and may not be validated by curative acts of the legislature. City of Lexington v. Lopp, 210 N.C. 196, 185 S.E. 766 (1936).

**When Courts Will Interfere with Tax Assessments.** — It is only when the actions of the State Board of Assessment (Department of Revenue) are found to be arbitrary and capricious that courts will interfere with tax assessments because of asserted violations of the due process clause. Albemarle Elec. Membership Corp. v. Alexander, 282 N.C. 402, 192 S.E.2d 811 (1972).

**Taxing of One District to Benefit An-**

**other.** — It is a fundamental principle in the law of taxation that taxes may only be levied for public purposes and for the benefit of the public on whom they are imposed. To lay these burdens upon one district for benefits appertaining solely to another is in clear violation of established principles of right and contrary to the express provision of this section, which forbids that any person shall be disseized of his freehold liberties and privileges or in any manner deprived of his life, liberty or property but by the law of the land. Commissioners of Johnston County v. Lacy, 174 N.C. 141, 93 S.E. 482 (1917); Hinton v. Lacy, 193 N.C. 496, 137 S.E. 669 (1927); Board of Comm'rs v. Hanchett Bond Co., 194 N.C. 137, 138 S.E. 614 (1927).

**Free or reduced telephone service to municipalities constitutes a tax prohibited by law,** and is discriminatory both as between towns which are similarly situated and as between those towns and individual rate payers living in towns or in the country. Hence, former G.S. 160-281.2 was unconstitutional because it offended the due process provisions of both the State and federal Constitutions, because it was not a uniform tax, because it interfered with vested rights, and because it was an attempt to surrender the police power of the State. State ex rel. North Carolina Util. Comm'n v. City of Wilson, 252 N.C. 640, 114 S.E.2d 786 (1960).

**Statute Held Valid.** — The distinction between "homes for the aged, sick, or infirm" and individual residential property owners under G.S. 105-275(32) (now 105-278.6A) is not unconstitutional under the equal protection clause. In re Barbour, 112 N.C. App. 368, 436 S.E.2d 169 (1993).

**Tax Statute Held Invalid.** — An act which permits the governing board of a town to list, value and revalue all property without providing for notice and hearing as to such valuations and without setting up precise standards for evaluation contravenes due process of law and is unconstitutional. Bowie v. Town of W. Jefferson, 231 N.C. 408, 57 S.E.2d 369 (1950).

**Forfeiture of property and vesting of title in another for tax delinquency by mere legislative declaration** is the taking of property without due process of law. Eason v. Spence, 232 N.C. 579, 61 S.E.2d 717 (1950).

**Sale of Land for Taxes.** — For a valid sale of land for taxes, the tax list and notice of sale must contain a sufficiently definite description of the land to allow the land to be identified, and to constitute notice to those persons whose interest is to be affected, and if the description is not so definite, a sale thereunder will be void as not complying with the statute, as taking property without giving notice, and as not affording those whose property is sold an opportunity to be heard. Bryson v. McCoy, 194 N.C. 91, 138 S.E. 420 (1927).

**Employment Security Tax.** — Imposition of employment security tax does not deprive an individual who operates three places of business, employing in the aggregate more than 8 employees, of property without due process of law or deny him of the equal protection of the laws. State ex rel. Unemployment Comp. Comm'n v. J.M. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941).

**Municipal Tax to Finance Extended Water and Sewer Facilities Prior to Annexation.** — A municipal corporation may issue bonds and levy taxes to pay principal and interest thereon and use the proceeds to finance the extension of water and sewer facilities into an area to be annexed at a fixed future date after the residents of the area to be annexed have approved the annexation and the citizens of the municipality have approved both the annexation and the issuance of bonds. Such bonds are for a public purpose, and the tax imposed within the municipality prior to annexation does not deprive the taxpayers of the city of property without due process of law. Thomasson v. Smith, 249 N.C. 84, 105 S.E.2d 416 (1958).

**Determining Rate of Inheritance Tax by Value of Decedent's Estate Wherever Located.** — The due process provisions of the federal and State Constitutions are not violated by use of the value of decedent's entire estate, wherever located, to determine the rate of inheritance tax to be applied to the transfer of property within this State. Rigby v. Clayton, 274 N.C. 465, 164 S.E.2d 7 (1968).

## IX. MISCELLANEOUS RIGHTS.

**Equal access to participation in the public school system.** is a fundamental right, guaranteed by the State Constitution and protected by considerations of procedural due process. Sneed v. Greensboro City Bd. of Educ., 299 N.C. 609, 264 S.E.2d 106 (1980).

Action for declaratory and injunctive relief brought by minors who were, or would be in the future, enrolled in public schools in the county, and their parents or legal guardians, alleging that the present statutory system of financing public schools in this State resulted in inequities in educational programs and facilities between the public schools within that county, which had a relatively low tax base from which to draw funds, and those in other counties with relatively high tax bases, and that the operation of five separate school systems in that county prohibited effective use of facilities and staff and promoted inequitable use of state and local funds, thus depriving them of equal opportunity to a free public school education in violation of this section, N.C. Const., Art. I, §§ 1 and 15, and Art. IX, § 2(1), failed to allege facts entitling them to relief or conferring jurisdiction on the courts of this State. Britt v. North Carolina State Bd. of Educ., 86 N.C. 282, 357 S.E.2d 432, appeal dismissed, 320 N.C. 790, 361 S.E.2d 71 (1987).

**Eligibility for In-State Tuition.** — A person's right to eligibility for in-state tuition is quite different from his basic constitutional right to travel freely from one state to another or his basic constitutional right to vote. Moreover, the regulations of the Board of Trustees of The University of North Carolina concerning eligibility for in-state tuition do not impede interstate travel. And since they do not relate to basic constitutional rights, such regulations are to be tested by the less stringent traditional equal protection standards, that test being whether the regulations have tended in general to assure that only North Carolina citizens get the benefit of in-state tuition, which the regulations have done. Glusman v. Trustees of Univ. of N.C., 281 N.C. 629, 190 S.E.2d 213 (1972), vacated on other grounds, 412 U.S. 947, 93 S. Ct. 2999, 37 L. Ed. 2d 999 (1973).

**Reemployment of Teachers.** — Those connected with school administration, including county boards of education and school principals, must act in good faith and not arbitrarily, capriciously or without just cause and must not be activated by selfish motives in deciding which teachers to reemploy for a school term. Wall v. Stanly County Bd. of Educ., 259 F. Supp. 238 (M.D.N.C. 1966), rev'd on other grounds, 378 F.2d 275 (4th Cir. 1967).

**The right to work and to earn a livelihood** is a property right that cannot be taken away except under the police power of the State in the paramount public interest for reasons of health, safety, morals, or public welfare. In re Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

The plaintiff ex-county health director failed to demonstrate that his due process rights were violated where four of the members of the Board of Health (the body which made the final decision to fire him) testified before an administrative law judge who was reviewing his dismissal; the court reasoned that such testimony, even if it revealed another's malfeasance, was not indicative, much less proof, of bias. Simpson v. Macon County, 132 F. Supp. 2d 407, 2001 U.S. Dist. LEXIS 864 (2001).

Historically and fundamentally, the constitutional guaranties of individual liberty protect the individual in the selection and pursuit of the ordinary occupations against the unwarranted invocation of the police power. State v. Harris, 216 N.C. 746, 6 S.E.2d 854, 128 A.L.R. 658 (1940).

This section guarantees the right to pursue ordinary and simple occupations free from governmental regulation. North Carolina Real Estate Licensing Bd. v. Aikens, 31 N.C. App. 8, 228 S.E.2d 493 (1976).

The right to work and earn a livelihood is a property right, considered fundamental under the North Carolina Constitution; consequently, regulation of otherwise lawful occupations and businesses must be based on some distinguishing feature in the business itself or in the manner in which it is ordinarily conducted, the natural and probable consequence of which, if unregulated, is to produce substantial injury to the public peace, health, or welfare. Poor Richard's, Inc. v. Stone, 86 N.C. App. 137, 356 S.E.2d 828 (1987), rev'd on other grounds, 322 N.C. 61, 366 S.E.2d 697 (1988).

**Occupational Licenses — Generally.** — A license to engage in an occupation is a property right. Parker v. Stewart, 29 N.C. App. 747, 225 S.E.2d 632 (1976).

**Same — Attorneys.** — As to the rights of attorneys who have been duly licensed to practice law, see Ex parte Schenck, 65 N.C. 353 (1871).

**Same — Detectives.** — The regulation of persons eligible to become licensed private detectives and commissioned special policemen is an exercise of authority in the interest of the general public, rather than a particular class. North Carolina Ass'n of Licensed Detectives v. Morgan, 17 N.C. App. 701, 195 S.E.2d 357 (1973).

**Same — Revocation.** — The government may not revoke an occupational license except by due process of law. Parker v. Stewart, 29 N.C. App. 747, 225 S.E.2d 632 (1976).

**Same — Suspension.** — The availability of prompt postsuspension review, along with a relatively brief suspension period, reduces the weight of the private interest in a suspended attorney's continued use of his or her law license pending the outcome of the postsuspension hearing. In re Lamm, 116 N.C. App. 382, 448 S.E.2d 125 (1994), aff'd, 341 N.C. 196, 458 S.E.2d 921 (1995).

The procedure contained in this rule, provides for independent judicial review by a superior court judge, who must determine if the affidavits and petition establish a sufficient showing to justify a suspension and this procedure satisfies the requirements for sufficient process under the Law of the Land Clause of the North Carolina Constitution. In re Lamm, 116 N.C. App. 382, 448 S.E.2d 125 (1994), aff'd, 341 N.C. 196, 458 S.E.2d 921 (1995).

**A city ordinance which bestowed unbridled discretionary power upon the city council to grant or to refuse to grant a license** to persons, associations or corporations to engage in the business of operating a restaurant, lunch counter, pressing club, moving picture show or market in the city violated the provisions of this section and U.S. Const., Amend. XIV. Carolina Restaurants, Inc. v. City of Kinston, 32 N.C. App. 588, 233 S.E.2d 74 (1977).

**The practice of law** is a property right requiring due process of law before it may be impaired. North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827, modified and aff'd, 304 N.C. 627, 286 S.E.2d 89 (1981).

**Right to Engage in Lawful Business — Generally.** — When the State's exercise of its police power works to deny a person, association or corporation the right to engage in a business which is otherwise lawful, such deprivation of liberty requires a substantially greater likelihood of benefit to the public in order to enable it to survive an attack based upon this section. North Carolina Ass'n of Licensed Detectives v. Morgan, 17 N.C. App. 701, 195 S.E.2d 357 (1973).

To deny a person, association or corporation the right to engage in a business which is otherwise lawful is a far greater restriction upon his or its liberty than to deny the right to charge in that business whatever prices the owner sees fit to charge for service. Consequently, such a deprivation of liberty requires a substantially greater likelihood of benefit to the public in order to enable it to survive an attack based upon this section. In re Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

**Same — Not Absolute.** — Freedom to contract and engage in a lawful business activity are rights guaranteed by the State and federal constitutions. However, these rights are not absolute, and limitations thereon imposed by the legislature are not violative of constitutional provisions so long as they are reasonable in light of the purposes to be accomplished. Louchheim, Eng & People, Inc. v. Carson, 35 N.C. App. 299, 241 S.E.2d 401 (1978).

**Freedom to contract** is both a liberty and a property right within the protection of the due process clauses of the federal Constitution and this section. See Morris v. Holshouser, 220 N.C. 293, 17 S.E.2d 115, 137 A.L.R. 733 (1941), discussing an employee's right to assign future wages.

Freedom of contract, unless contrary to public policy or prohibited by statute, is a fundamental right included in our constitutional guaranties. Muncie v. Travelers Ins. Co., 253 N.C. 74, 116 S.E.2d 474 (1960); Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co., 283 N.C. 87, 194 S.E.2d 834 (1973).

**An employment contract is not a sufficient proprietary interest** to require full-scale constitutional protection in the form of a pretermination hearing. Maines v. City of Greensboro, 300 N.C. 116, 265 S.E.2d 204 (1980).

**Enforcement of Insurance Contract.** — Where a provision in an insurance policy is a valid one, the parties are entitled to have it enforced as written, and the Supreme Court cannot ignore any part of the contract. Muncie v. Travelers Ins. Co., 253 N.C. 74, 116 S.E.2d 474 (1960).

**Sovereign immunity is not a defense to an action against the State for breach of a contract** entered into by the State's authorized officers and agencies, since to deny the party who has performed his obligation under a contract the right to sue the State when it defaults is to take his property without compensation and thus to deny him due process. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Trial court did not err in denying the State's sovereign immunity defense in state employees' breach of contract action because a contract between the State Health Plan and an insurance company was made to confer longterm care benefits directly upon state employees as consideration for their employment; (1) sovereign immunity may be waived when the State enters into a valid contract; (2) when the State waives sovereign immunity, it occupies the same position as any other litigant; (3) when the State occupies the same position as any other litigant, it may be sued by a third party to enforce a contract made for the direct benefit of that third party; and (4) sovereign immunity does not bar third-party beneficiary contract claims against the State. Carl v. State, — N.C. App. —, 665 S.E.2d 787, 2008 N.C. App. LEXIS 1630 (2008), review denied, cert. denied, 363 N.C. 123 (2009).

**Obligation of Contract May Not Be Impaired.** — The obligation of a contract, within the meaning of the constitutional prohibition against impairment, includes all the means and assurances available for enforcement of the contract at the time of its execution. Bateman v. Sterrett, 201 N.C. 59, 159 S.E. 14 (1931).

This section prohibits enforcing any statute which would enable one person to evade or avoid the binding force of his contracts with another, whether executed or executory. Booth v. Hairston, 193 N.C. 278, 136 S.E. 879, 57 A.L.R. 1186 (1927), appeal dismissed, 195 N.C. 8, 141 S.E. 480 (1928), citing Lowe v. Harris, 112 N.C. 472, 17 S.E. 539, 22 L.R.A. 379 (1893).

**The right to travel** is a part of the liberty of which the citizen cannot be deprived without due process of law, but it can be restricted consistent with due process of law. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

**Quarantine of Disaster Areas.** — The constitutional protection of the freedom of travel does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

**Right to Traverse City Streets.** — The right to travel upon the public streets of a city is a part of every individual's liberty, protected by the law of the land clause of the Constitution of North Carolina. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

**Curfew Where Danger Is Clear and Present.** — Where the danger is clear and present, the Constitutions of the United States and of North Carolina do not forbid city authorities to declare a state of emergency and to proclaim and enforce a temporary, night-to-night, city-wide curfew, with specified exceptions for emergency and necessary travel. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

**Right to Jury Trial in Termination of Parental Rights.** — There exists no constitutional right to trial by jury in proceedings to terminate parental rights. In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981).

**The General Assembly may not diminish a vested interest** by artificially increasing the class in which the estate has vested. Wachovia Bank & Trust Co. v. Andrews, 264 N.C. 531, 142 S.E.2d 182 (1965).

**Public Office Is Not A Vested Property Right.** — For case overruling line of cases which stood for the proposition that a public office was property in which the officeholder held a property interest, see Mial v. Ellington, 134 N.C. 131, 46 S.E. 961 (1903).

**Vested Rights in Dedicated Property.** — Where lots in a subdivision were sold with reference to a plat showing the street in question to be 99 feet in width, while at the time the charter was granted to a municipality embracing the lands, the only plat recorded was a revised one showing the street as 80 feet wide, the granting of the charter could not be construed as having the effect of limiting the width of the street to 80 feet so as to defeat the vested right of purchasers of lots with reference to the original plat to compel the owner to abide by its dedication of the street for the full width as shown by the plat. Home Real Estate Loan & Ins. Co. v. Town of Carolina Beach, 216 N.C. 778, 7 S.E.2d 13 (1940).

**Abandonment of Part of Road.** — The action of the governing body of a town in abandoning and permitting part of a road in a subdivision to be closed for the private use and benefit of the defendant property owners in the subdivision was in violation of the rights of other purchasers in the subdivision under this section and under U.S. Const., Amend. XIV. Town of Blowing Rock v. Gregorie, 243 N.C. 364, 90 S.E.2d 898 (1956).

**Vested Rights in Pre-1983 Estates by the Entirety.** — The claim of a vested property right may not rest upon state enforcement of common law which is unconstitutionally discriminatory. Thus, to the extent that defendant husband's claims to the exclusive right to the control and income of pre-1983 estates by the entirety were based solely upon common-law incidents of the tenancy, they would fail, as the right recognized by the common law could not be said to be a "vested property right." Perry v. Perry, 80 N.C. App. 169, 341 S.E.2d 53, appeal dismissed, 320 N.C. 170, 357 S.E.2d 925 (1987). See § 39-13.6.

**Resolution Restricting Vested Allowance was Improper.** — County's resolution, pursuant to its authority under G.S. 143-166.42, restricting a former officer's ability to collect a special separation allowance, impaired the obligation of the state's contract with former officer under the retirement system; because the resolution was enacted after the former officer had retired and his right to receive the special separation had become vested, it was improper. Wiggs v. Edgecombe County, 179 N.C. App. 47, 632 S.E.2d 249, 2006 N.C. App. LEXIS 1645 (2006).

**Destruction or Diminishment of Contingent Property Interests.** — Retrospective statutes destroying or diminishing contingent interests in property do not, per se, deprive the holder thereof of property without due process of law, in violation of U.S. Const., Amend. XIV or this section, nor do they violate any other constitutional limitation upon legislative power. Peele v. Finch, 284 N.C. 375, 200 S.E.2d 635 (1973).

**Statutes destroying or diminishing contingent interests in property** do not, per se, deprive the holder thereof of property without due process of law or violate any other constitutional limitation upon legislative power. Crumpton v. Crumpton, 290 N.C. 651, 227 S.E.2d 587 (1976); Crumpton v. Mitchell, 303 N.C. 657, 281 S.E.2d 1 (1981).

**Sale of Lands Subject to Contingent Interest.** — A contingent remainderman in lands acquires his interest therein subject to the payment of testator's debts, and in that respect can acquire no vested interest therein, and a sale thereof in good faith and at a fair price by the executrix, for the payment of decedent's debts, as authorized by statute, when by proper proceedings the land could have been sold for the purpose, though the executrix has mistaken therein the authority given her under the will, could not be held as contrary to the provision of this section. Charlotte Consol. Constr. Co. v. Brockenbrough, 187 N.C. 65, 121 S.E. 7 (1924).

**Where legal liability has been created, the legislature cannot take it away** without violating this section. Lester Bros. v. Pope Realty & Ins. Co., 250 N.C. 565, 109 S.E.2d 263 (1959).

**As to the prospective nature of additional liability imposed by amendatory act,** see Bank of Pinehurst v. Derby, 218 N.C. 653, 12 S.E.2d 260 (1940).

**The legislature may limit the time for assertion of a property right,** provided it affords those vested with the right a reasonable time to assert the same after the enactment of the statute, since there is no vested right in procedure. Sheets v. Walsh, 217 N.C. 32, 6 S.E.2d 817 (1940).

**No Constitutional Right to Erosion Control.** — Plaintiffs' claim that hardened structure rules promulgated by defendants effected a taking of property without just compensation and violated G.S. 113A-128 of the Coastal Area Management Act were properly dismissed, because plaintiffs failed to cite any persuasive authority for the proposition that a littoral or riparian landowner has a right to erect hardened structures in statutorily designated areas of environmental concern to protect their property from erosion or migration. Shell Island Homeowners Ass'n v. Tomlinson, 134 N.C. App. 217, 517 S.E.2d 406 (1999).

**Hardened structure rules,** codified at 15A NCAC 7H.0308 and 7H.0301, which prevent permanent structures from being erected in environmentally sensitive areas which may adversely impact the value of the land and adjacent properties, as well as the right to public enjoyment of such areas, are clearly rationally related to legitimate government interests and, therefore, did not violate plaintiffs' equal protection rights. Shell Island Homeowners Ass'n v. Tomlinson, 134 N.C. App. 217, 517 S.E.2d 406 (1999).

**Revival of Barred Claims.** — A State statute purporting to revive a claim barred by the statute of limitations violates the due process clauses of the State and federal Constitutions, whether such claim affects vested property right or arises under contract. Valleytown Tp. v. Women's Catholic Order of Foresters, 115 F.2d 459 (4th Cir. 1940).

**Right of Appeal.** — For discussion of whether the right of appeal is essential to the "due process" clauses of the State or federal Constitutions, see Gunter v. Town of Sanford, 186 N.C. 452, 120 S.E. 41 (1923).

**G.S. 15A-1343(b2)(4) imposed a mandatory condition prohibiting defendant from living with a minor, and did not permit exceptions for defendant's own children;** where defendant was convicted of taking indecent liberties with a child arising from his sexual misconduct with his minor sister-in-law, G.S. 15A-1343(b2)(4) was a valid probation condition, and did not violate due process even though it prohibited defendant from living with his own child. State v. Strickland, 169 N.C. App. 193, 609 S.E.2d 253, 2005 N.C. App. LEXIS 522 (2005).

## X. CHALLENGES TO STATUTES, ETC., ON CONSTITUTIONAL GROUNDS.

**When Statute Will Be Declared Invalid.** — It is only when a classification or distinction in a statute is arbitrary and unjustifiable upon any reasonable view that it becomes invidious and offensive to the Constitution, so that the court may undertake to exercise the extraordinary power it possesses to declare the statute void. The unconstitutionality must clearly appear before the court can so declare it. Vinson v. Chappell, 3 N.C. App. 348, 164 S.E.2d 631 (1968), aff'd, 275 N.C. 234, 166 S.E.2d 686 (1969); Raleigh Mobile Home Sales, Inc. v. Tomlinson, 276 N.C. 661, 174 S.E.2d 542 (1970).

**The burden of establishing the unconstitutionality of a statute rests upon him who assails it,** and courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. Raleigh Mobile Home Sales, Inc. v. Tomlinson, 276 N.C. 661, 174 S.E.2d 542 (1970).

**And reasonable doubt must be resolved in favor of constitutionality** of an act of the General Assembly, so that a statute will not be declared unconstitutional unless it is clearly so. Vinson v. Chappell, 3 N.C. App. 348, 164 S.E.2d 631 (1968), aff'd, 275 N.C. 234, 166 S.E.2d 686 (1969).

**If a statute is susceptible of two interpretations, one constitutional and the other unconstitutional, the former will be adopted.** Currituck County v. Willey, 46 N.C. App. 835, 266 S.E.2d 52, cert. denied, 301 N.C. 234, 283 S.E.2d 131 (1980).

**But a statute so loosely and obscurely drawn as to be incapable of enforcement must be held void.** In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

**Separate Classifications.** — Under the state and federal equal protection clauses, a state statute or regulation which has the effect of creating separate classifications preferring one group over another must be rationally related to legitimate state interest(s). Harris v. Flaherty, 90 N.C. App. 110, 367 S.E.2d 364 (1988).

**Regulations Must Be Reasonable.** — State economic regulatory classifications need bear only a rational relationship to a legitimate governmental objective in order to withstand an equal protection challenge. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

**No Vested Right in Continuation of an Existing Law.** — The fact that husband acquired property during marriage but prior to the effective date of the Equitable Distribution Act does not mean that he also acquired a vested right in the law governing the disposition of property upon divorce which was in effect either at the time the property was acquired or at the time of his marriage. There is no such thing as a vested right in the continuation of an existing law. Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988).

**A municipal ordinance is presumed to be valid,** and the burden is upon the complaining party to show its invalidity or inapplicability. Moreover, a municipal ordinance promulgated in the exercise of the police power will not be declared unconstitutional unless it is clearly so, and every intendment will be made to sustain it. Currituck County v. Willey, 46 N.C. App. 835, 266 S.E.2d 52, cert. denied, 301 N.C. 234, 283 S.E.2d 131 (1980).

**The party assailing the constitutionality of an ordinance must carry the burden** of showing that the ordinance does not rest upon any reasonable basis, but is essentially arbitrary; and if any state of facts reasonably can be conceived that would sustain the ordinance, the existence of that state of facts at the time the ordinance was enacted must be assumed. Currituck County v. Willey, 46 N.C. App. 835, 266 S.E.2d 52, cert. denied, 301 N.C. 234, 283 S.E.2d 131 (1980).

**An ordinance on its face must be fair and impartial** and must not permit unwarranted discrimination. Maines v. City of Greensboro, 300 N.C. 116, 265 S.E.2d 204 (1980).

**An ordinance which vests unlimited or unregulated discretion in a municipal officer is void.** Maines v. City of Greensboro, 300 N.C. 116, 265 S.E.2d 204 (1980).

## XI. ILLUSTRATIVE CASES.

### A. Statutes, Proceedings, etc., Upheld.

**Alcoholic Beverage Control.** — For case upholding legislation providing for revocation or suspension of a retail beer permit for violation of statutory provisions, see Boyd v. Allen, 246 N.C. 150, 97 S.E.2d 864 (1957).

The constitutional right to earn a livelihood by engaging in the restaurant business was not infringed by either the Turlington Act or the ABC Act. D & W, Inc. v. City of Charlotte, 268 N.C. 577, 151 S.E.2d 241, supplemental opinion, 268 N.C. 720, 152 S.E.2d 199 (1966).

**Annexation.** — It is not a denial of the equal protection of the law for a city to annex land without annexing other land similarly situated. Piedmont Ford Truck Sale, Inc. v. City of Greensboro, 324 N.C. 499, 380 S.E.2d 107 (1989).

**Anti-subrogation Rule.** — Insurance Commissioner's anti-subrogation rule does not impermissibly interfere with the constitutional liberty to contract. In re Ruling by N. C. Comm'r of Ins., 134 N.C. App. 22, 517 S.E.2d 134, 1999 N.C. App. LEXIS 665 (1999), cert. denied, appeal dismissed, 351 N.C. 105, 540 S.E.2d 356 (1999).

**Attorney Disciplinary Proceedings.** — Where the evidence supported findings by the Disciplinary Hearing Commission that defendant attorney, in representing a client charged with driving under the influence of alcohol, advised a potential State's witness that his client claimed that the potential witness was driving the car at the time in question, that defendant advised the potential witness either not to appear in court or to plead the Fifth Amendment (U.S. Const., Amend. V), and that defendant told the potential witness that his client would not testify against the witness if the witness would not testify against his client, the Commission's order of public censure was proper and did not violate defendant's right to due process and equal protection. North Carolina State Bar v. Graves, 50 N.C. App. 450, 274 S.E.2d 396 (1981).

**Ballot Access Restriction.** — The ten percent (10%) numerical signature requirement contained in G.S. 163-122(a)(3) is an unconstitutional ballot access restriction for unaffiliated candidates in violation of the U.S Const., Amend. I and XIV and N.C. Const., Art. I, § 10 and this section. Obie v. North Carolina State Bd. of Elections, 762 F. Supp. 119 (E.D.N.C. 1991).

**Election Statutes.** — The trial court properly refused to declare G.S. 163-106 and 163-323 unconstitutional although, taken together, they created a "loophole" which allowed a candidate to run for a superior court seat and another office on the same election day, regardless of the filing periods; the provisions did not create a benefit to lawyers while denying nonlawyers the equal protection of the law, they did not remove the election process from the hands of the voters, and they did not allow dual officeholding in violation of Art. VI, § 9 of the North Carolina Constitution, although they did allow dual candidacy. Comer v. Ammons, 135 N.C. App. 531, 522 S.E.2d 77, 1999 N.C. App. LEXIS 1179 (1999).

**Banking Institutions.** — Former section 53-229, relating to the acquisition and control of certain nonbank banking institutions, did not violate the commerce clause of the U.S. Constitution, nor the equal protection, exclusion emoluments and antimonopoly provisions of N.C. Const., Art. I, § 19, 32 and 34. Citicorp v. Currie, 75 N.C. App. 312, 330 S.E.2d 635, cert. denied and appeal dismissed, 314 N.C. 537, 314 N.C. 538, 335 S.E.2d 15, 335 S.E.2d 16, 335 S.E.2d 15, 335 S.E.2d 16 (1985).

**Section 53-229, relating to the acquisition and control of certain nonbank banking institutions,** does not violate the commerce clause of the U.S. Constitution, nor the equal protection, exclusion emoluments and antimonopoly provisions of N.C. Const., Art. I, §§ 19, 32 and 34. Citicorp v. Currie, 75 N.C. App. 312, 330 S.E.2d 635, cert. denied and appeal dismissed, 314 N.C. 538, 335 S.E.2d 15, 335 S.E.2d 16 (1985).

**The Beer Franchise Law** does not unreasonably interfere with the rights of suppliers to freely contract with wholesalers in violation of due process or this section. Mark IV Beverage, Inc. v. Molson Breweries USA, Inc., 129 N.C. App. 476, 500 S.E.2d 439 (1998), cert. denied, 349 N.C. 231, 515 S.E.2d 705 (1998), cert. denied, 349 N.C. 360, 505 S.E.2d 884 (1998).

**Conditions for licenses to operate bingo games** set out in G.S. 14-309.7 and 14-309.8 are reasonably related to a legitimate interest that bingo games not be operated by full-time professionals for profit. Durham Council of Blind v. Edmisten, 79 N.C. App. 156, 339 S.E.2d 84, cert. denied and appeal dismissed, 316 N.C. 552, 344 S.E.2d 5 (1986).

**Bonds.** — Local bond issue of town of Lake Lure held not to violate this section. Keeter v. Town of Lake Lure, 264 N.C. 252, 141 S.E.2d 634 (1965).

Session Laws of 1967, c. 1177, authorizing the State Education Assistance Authority to issue revenue bonds and to use the proceeds therefrom for making loans to residents of this State to enable them to obtain an education in an eligible institution, does not unconstitutionally authorize use of public funds in violation of this section. State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970).

**Zoning Ordinance Upheld.** — Where only four residences in the vicinity of property owners' residence were built beyond the property line and where the town building inspector had indicated that in his 16 years on the job, a rear yard setback of seven and a half feet from the property line was required, there was no evidence to suggest "conscious and intentional discrimination" on the part of the town in enforcing its setback ordinance, such that an equal protection violation under U.S. Const., Amend. XIV or N.C. Const., Art. I, § 19 was shown; accordingly, the town's zoning ordinance withstood constitutional attack. Prewitt v. Town of Wrightsville Beach, 161 N.C. App. 481, 595 S.E.2d 442, 2003 N.C. App. LEXIS 2192 (2003).

**County Sign Ordinance.** — Provision of county sign ordinance requiring nonconforming uses to be discontinued within three years from effective date of ordinance, thus giving the owner of a nonconforming sign a three-year period in which to amortize or depreciate the cost of the sign, is reasonable and does not provide for an unconstitutional taking of property. County of Cumberland v. Eastern Fed. Corp., 48 N.C. App. 518, 269 S.E.2d 672, cert. denied, 301 N.C. 527, 273 S.E.2d 453 (1980).

A county sign ordinance does not violate the equal protection clause of U.S. Const., Amend. XIV or this section merely because the county will not enforce the ordinance with respect to any person owning or operating a sign in certain municipalities within the county, since counties may not exercise zoning authority within a city which has enacted a zoning ordinance and counties may defer from zoning within cities. County of Cumberland v. Eastern Fed. Corp., 48 N.C. App. 518, 269 S.E.2d 672, cert. denied, 301 N.C. 527, 273 S.E.2d 453 (1980).

Since the restrictions in the Sign Control Ordinance of Transylvania County, North Carolina, are rationally related to the legitimate state concern of protecting the health, welfare, and safety of the citizens of the State of North Carolina, the ordinance does not violate the equal protection guarantee of N.C. Const., Art. I, § 19. Transylvania County v. Moody, 151 N.C. App. 389, 565 S.E.2d 720, 2002 N.C. App. LEXIS 748 (2002).

**A city ordinance providing for conveyance of open space** to an association of home owners living within the subdivision is reasonably related to the purpose of preserving urban open space so as to withstand a challenge under this section. River Birch Assocs. v. City of Raleigh, 326 N.C. 100, 388 S.E.2d 538 (1990).

**Town Ordinance Barring Sex Offenders from Parks.** — Woodfin, N.C., Ordinance § 130.03 was constitutional under the Fourteenth Amendment of the United States Constitution and N.C. Const., Art. I, §§ 19 and 35 as: (1) a sex offender's alleged liberty interest to enter a park owned by a town to have barbecues and enjoy nature was not protected by the right to intrastate travel; (2) an asserted liberty interest to freely roam in parks was not a fundamental right; (3) a town had been delegated the authority to prohibit acts detrimental to its citizens' health, safety, or welfare by G.S. 160A-174; (4) G.S. 14-208.5 recognized that sex offenders posed a high risk of engaging in sex offenses; and (5) Woodfin, N.C., Ordinance § 130.03 was rationally related to a legitimate government interest in protecting children and other visitors to parks owned and operated by the town from sexual attacks. Standley v. Town of Woodfin, 362 N.C. 328, 661 S.E.2d 728, 2008 N.C. LEXIS 496 (2008).

**Criminal Statutes.** — Section 14-72.1, relating to the concealment of merchandise in mercantile establishments, violates neither this section nor the due process clause of the federal Constitution. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961).

For case upholding G.S. 14-353, prohibiting the influencing of agents and servants in violating their duties, see State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

For case upholding validity of former G.S. 14-273, prohibiting the disturbing of schools and scientific and temperance meetings, see State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967), cert. denied, 390 U.S. 1028, 88 S. Ct.

1418, 20 L. Ed. 2d 285 (1968).

The statutory scheme of Chapter 14, Article 36A (G.S. 14-288.1, et seq.) is not unconstitutional in contravention of this section. State v. Dobbins, 9 N.C. App. 452, 176 S.E.2d 353 (1970), aff'd, 277 N.C. 484, 178 S.E.2d 449 (1971).

A statute imposing criminal sanctions for the infliction of physical injury on children by their parents is not repugnant to this section. State v. Fredell, 283 N.C. 242, 195 S.E.2d 300 (1973).

For a discussion of the constitutionality of G.S. 20-141.4(a2), relating to misdemeanor death by vehicle, see State v. Smith, 90 N.C. App. 161, 368 S.E.2d 33 (1988), aff'd, 323 N.C. 703, 374 S.E.2d 866, cert. denied, 490 U.S. 1100, 109 S. Ct. 2453, 104 L. Ed. 2d 1007 (1989).

Although consent is not a defense to statutory rape under G.S. 14-27.7A, the sentencing scheme does not violate the North Carolina Constitution. State v. Anthony, 133 N.C. App. 573, 516 S.E.2d 195, 1999 N.C. App. LEXIS 604 (1999), appeal dismissed, cert. granted, 351 N.C. 109, 516 S.E.2d 195 (1999), aff'd, 528 S.E.2d 321 (2000).

Lack of a mens rea element in G.S. 14-269.2 did not offend the equal protection requirements of N.C. Const., Art. I, § 19, or U.S. Const., Amend. XIV, § 1, because the distinction between those exempt from prosecution under G.S. 14-269.2(g) and those subject to prosecution, despite having no criminal intent, did not violate equal protection, as the statutory exemptions bore a rational relationship to a legitimate governmental interest in that they struck an appropriate balance between the safety of children and the furtherance of education. State v. Haskins, 160 N.C. App. 349, 585 S.E.2d 766, 2003 N.C. App. LEXIS 1792 (2003), appeal dismissed sub nom. State v. Haskins, 357 N.C. 580, 589 S.E.2d 356 (2003).

Since a convicted felon's re-acquired right to bear arms was subject to regulation and was not completely abridged by a subsequent amendment to G.S. 14-415.1, which prohibited the ex-felon from possessing handguns outside his home or business, and since the regulation was reasonably related to further securing the public's safety, there was no interference with any vested right when the statute was amended to include the ex-felon; he was properly convicted and sentenced for violating the statute without any violation of his right to due process. State v. Johnson, 169 N.C. App. 301, 610 S.E.2d 739, 2005 N.C. App. LEXIS 612 (2005).

**Search and Seizure.** — Where an officer observed defendant drive over a curb, back away from the officer, and reach into a pocket in a location known for drug activity, defendant's motion to suppress was properly denied because the officer had reasonable suspicion to make an investigatory stop and had probable cause to seize a film canister from defendant's pocket during a pat-down for weapons based on, inter alia, defendant's actions, the area's reputation, and the officer's prior experiences. State v. Robinson, 189 N.C. App. 454, 658 S.E.2d 501, 2008 N.C. App. LEXIS 648 (2008).

**Possession of Firearm by Convicted Felon.** — G.S. 14-451.1 did not violate the convicted felon's due process or equal protection rights because plaintiff's right to possess firearms was not a vested right and the statutory scheme treated all felons the same and served to protect the health, welfare, and safety of the citizens of North Carolina. Britt v. State, 185 N.C. App. 610, 649 S.E.2d 402, 2007 N.C. App. LEXIS 1938 (2007).

**Sex Offender Registration Requirement.** — Detective's testimony that he advised defendant of the registration requirements of G.S. 14-208.11 when defendant initially registered as a sex offender was sufficient to satisfy due process. State v. White, 162 N.C. App. 183, 590 S.E.2d 448, 2004 N.C. App. LEXIS 111 (2004).

North Carolina's sex offender registration statute, G.S. 14-208.11, is facially constitutional as applied to a convicted sex offender from another jurisdiction, who subsequently moved to North Carolina, because such a defendant has actual notice of his or her lifelong duty to register as a result of his or her out-of-state conviction, which provides a reasonable individual to inquire of a duty to register in any state upon relocation. State v. Bryant, 359 N.C. 554, 614 S.E.2d 479, 2005 N.C. LEXIS 647 (2005).

**Defendant's Failure to Request Competency Hearing or Make Motion Regarding Competency Waived Due Process Claim.** — Defendant waived the claim that defendant's right to due process was violated when the trial court failed to ensure that defendant had the mental capacity to understand the nature and object to the proceedings, to consult with counsel, and to assist in her defense, because defendant did not request a competency hearing or make a motion detailing the conduct resulting in a question as to defendant's capacity to proceed after defendant's was not given anti-anxiety medication on one day of trial. State v. Goode, — N.C. App. —, 677 S.E.2d 507, 2009 N.C. App. LEXIS 728 (2009).

**Sanctions by Board of Dental Examiners.** — The imposition of sanctions against a dentist for violating the provision of G.S. 90-41(a)(13) against hiring dentists unlicensed in North Carolina did not violate this section or federal due process. Armstrong v. North Carolina State Bd. of Dental Exmrs., 129 N.C. App. 153, 499 S.E.2d 462 (1998), cert. denied, 525 U.S. 1103, 119 S. Ct. 869, 142 L. Ed. 2d 770 (1999).

**Divorce Provisions.** — The amendment to

G.S. 50-6 abolishing the defense of recrimination in a divorce action based on a year's separation does not deprive a party who was married before the amendment of a vested property right under the due process clause of U.S. Const., Amend. XIV or the "law of the land clause" of this section. Sawyer v. Sawyer, 54 N.C. App. 141, 282 S.E.2d 527 (1981).

**Drug Testing.** — Plaintiff's duties consisted of generally performing preventative maintenance and repairs on airport terminal air conditioning and ventilating and heating systems, but plaintiff also had security clearance to drive a motor vehicle 10 M.P.H. in a designated area on the apron of the flight area in order to get access to the systems located on the outside of the building. Plaintiff, if drug-impaired while operating a motor vehicle on the apron of the flight area, could increase the risk of harm to others. Accordingly, a drug testing policy implemented by defendants (employer) was constitutional. Boesche v. Raleigh-Durham Airport Auth., 111 N.C. App. 149, 432 S.E.2d 137, cert. granted, 334 N.C. 687, 436 S.E.2d 370 (1993).

**Provisions of the Uniform Reciprocal Enforcement of Support Act.** — Former sections 52A-29 and 52A-30 comport with the due process requirements of the federal and State Constitutions. Allsup v. Allsup, 323 N.C. 603, 374 S.E.2d 237 (1988).

**Employment Matters.** — City officials and city were granted summary judgment on an employee's procedural and substantive due process claims brought pursuant to U.S. Const., Amend XIV and N.C. Const., Art. I, § 19, where the city had adopted the city manager form of government under G.S. 160A-101(9)(b), the controlling laws for that form of government did not provide a fixed term of employment or termination procedures for police officers, there was no evidence that either the city manager or city ratified alleged statements of an implied employment contract, and as a result, the employee had no property interest in her job. Disher v. Weaver, 308 F. Supp. 2d 614, 2004 U.S. Dist. LEXIS 3849 (M.D.N.C. 2004).

**Eviction Proceedings.** — An eviction proceeding in a North Carolina state court pursuant to the North Carolina eviction statute will provide the tenant with all the process that is due. Roanoke Chowan Regional Hous. Auth. v. Vaughan, 81 N.C. App. 354, 344 S.E.2d 578, cert. denied, 317 N.C. 706, 347 S.E.2d 439 (1986).

**Foreclosure.** — The State may proceed directly or by authorization to others to sell lands for taxes upon proceedings to enforce a lien for the taxes thereon, and a publication of notice to all interested in the lands to appear and defend their rights is not a taking of property inhibited by this section. Orange County v. Jenkins, 200 N.C. 202, 156 S.E. 774 (1931).

This section is not violated by G.S. 45-21.34, regulating the sale of real property upon the foreclosure of mortgages or deeds of trust. Woltz v. Asheville Safe Deposit Co., 206 N.C. 239, 173 S.E. 587 (1934).

Section 45-21.36 is constitutional and valid, since it recognizes the obligation of the debtor to pay his debt and the right of the creditor to enforce payment by action in accordance with the terms of the agreement, but provides merely for judicial supervision of sales under power to the end that the price bid at the sale shall not be conclusive as to the value of the property, and that the creditor may not recover any deficiency after applying the purchase price to the notes without first accounting for the fair value of the property in accordance with well-settled principles of equity. Richmond Mtg. & Loan Corp. v. Wachovia Bank & Trust Co., 210 N.C. 29, 185 S.E. 482 (1936), aff'd, 300 U.S. 124, 57 S. Ct. 338, 81 L. Ed. 552 (1937).

The notice of foreclosure by sale as provided for in a deed of trust and as required under G.S. 45-21.17 was held sufficient to meet the minimum due process requirements. Huggins v. Dement, 13 N.C. App. 673, 187 S.E.2d 412, appeal dismissed, 281 N.C. 314, 188 S.E.2d 898, cert. denied, 409 U.S. 1071, 93 S. Ct. 677, 34 L. Ed. 2d 659 (1972).

The notice requirement of G.S. 105-375 is not compelled by due process. And where due process was satisfied by notice to the listing taxpayer as provided by G.S. 105-375, the county was not required to shoulder the intolerable burden of directly notifying the heirs of a listing taxpayer who died prior to issuance of execution. Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976), rev'd on other grounds, 292 N.C. 692, 235 S.E.2d 166 (1977).

**Grade Crossing Improvements.** — A state or its subdivisions, in the exercise of the police power, may validly allocate a portion, or under some circumstances even all, of the costs of grade crossing improvements to the railroads, provided the allocation of costs is fair and reasonable under all existing circumstances. Southern Ry. v. City of Winston-Salem, 4 N.C. App. 11, 165 S.E.2d 751, aff'd, 275 N.C. 465, 168 S.E.2d 396 (1969).

**Hazardous Occupation Statute.** — Assuming arguendo that defendant-employer did have standing to assert a constitutional challenge to G.S. 97-61.5 on the basis that it treats employees with asbestosis or silicosis differently than employees who contract occupational diseases other than asbestosis or silicosis, the court agreed with the Industrial Commission that the statute was not unconstitutional; enacted as an added benefit to employees suffering from asbestosis or silicosis, its purpose to account for the incurable, latent, and unique nature of asbestosis and silicosis, factors not apparent in other occupational diseases, permit the statute to survive minimum scrutiny. Jones v. Weyerhaeuser Co., 141 N.C. App. 482, 539 S.E.2d 380, 2000 N.C. App. LEXIS 1413 (2000), appeal dismissed and cert. denied, 353 N.C. 525, 549 S.E.2d 858 (2001).

**Improper Argument Cured By Jury Instructions That Correctly Stated Applicable Law.** — Trial court's failure to intervene ex mero motu to strike the state's closing argument that defendant would be guilty of first-degree murder even if the victim had pulled the trigger was cured by the trial court's jury instructions, which correctly stated the law regarding acting in concert. State v. Williams, 185 N.C. App. 318, 648 S.E.2d 896, 2007 N.C. App. LEXIS 1824 (2007), appeal dismissed, review denied, 362 N.C. 372 (2008).

**Institutional Costs.** — The law makes no unconstitutional discrimination between classes when it charges all tubercular patients the same rate, but actually collects only from those who can pay. Graham v. Reserve Life Ins. Co., 274 N.C. 115, 161 S.E.2d 485 (1968).

Chapter 143, Article 7 (G.S. 143-117 et seq.) is not unconstitutional in contravention of this section. State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975), aff'd, 292 N.C. 147, 232 S.E.2d 698 (1977).

There is no constitutional impediment to the collection of the sums sought by the State pursuant to G.S. 143-117 for the period of confinement following defendant's acquittal by reason of insanity. State ex rel. Dorothea Dix Hosp. v. Davis, 292 N.C. 147, 232 S.E.2d 698 (1977).

**Insurance Provisions.** — Requiring an insurance company to issue assigned risk motor vehicle liability policies as a condition of transacting liability insurance business in North Carolina does not constitute a denial of due process in violation of State and federal constitutional provisions. Jones v. State Farm Mut. Auto. Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967).

**Interest.** — Section 24-5 does not violate this section, the equal protection and due process clauses of U.S. Const., Amend. XIV or the exclusive emoluments clause contained in N.C. Const., Art. I, § 32. Lowe v. Tarble, 312 N.C. 467, 323 S.E.2d 19 (1984), rehearing granted, 313 N.C. 176, 326 S.E.2d 32, aff'd on rehearing, 313 N.C. 460, 329 S.E.2d 648 (1985).

Section 24-5 does not violate the equal protection clause of U.S. Const., Amend. XIV or this section. Powe v. Odell, 312 N.C. 410, 322 S.E.2d 762 (1984).

Section 24-5, relating to the imposition of interest, does not violate N.C. Const., Art. I, §§ 19 and 32 and the equal protection and due process clauses of U.S. Const., Amend. XIV. Harris v. Scotland Neck Rescue Squad, Inc., 75 N.C. App. 444, 331 S.E.2d 695, cert. denied, 314 N.C. 329, 333 S.E.2d 486 (1985).

**Limitation Statutes.** — Statute requiring action for malpractice in performance of professional services for a minor to be brought before minor attains age of 19 when three-year limitation expires before minor attains age of 19 did not violate the equal protection clauses of the North Carolina or United States Constitutions on grounds that a person has three years after reaching the age of 18 in which to bring other types of tort actions, since there is a substantial distinction between persons who have malpractice claims and those with other types of tort claims. Hohn v. State, 48 N.C. App. 624, 269 S.E.2d 307 (1980), cert. denied, 301 N.C. 720, 274 S.E.2d 229 (1981).

Sections 1-50(5) (now 1-50(a)(5)) and 1-15(c) are not unconstitutional as being violative of the open courts provision of the North Carolina Constitution and the equal protection clauses of the State and federal Constitutions. Square D Co. v. C.J. Kern Contractors, 314 N.C. 423, 334 S.E.2d 63 (1985).

Section 1-50 does not distinguish between manufacturers and retail sellers of products who are protected from liability beyond the six-year period of repose and does not violate the equal protection clauses or the State or federal Constitutions. Tetterton v. Long Mfg. Co., 314 N.C. 44, 332 S.E.2d 67 (1985).

**Section 24-5, relating to the imposition of interest,** does not violate this section, the Equal Protection and Due Process Clauses of U.S. Const., Amend. XIV, or the exclusive emoluments clause contained in N.C. Const., Art. I, § 32. Lowe v. Tarble, 312 N.C. 467, 323 S.E.2d 19 (1984), rehearing granted, 313 N.C. 176, 326 S.E.2d 32, aff'd on rehearing, 313 N.C. 460, 329 S.E.2d 648 (1985).

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Section 24-5, relating to the imposition of interest, does not violate Art. I, §§ 19 and 32 of the North Carolina Constitution and the equal protection and due process clauses of U.S. Const., Amend. XIV. Harris v. Scotland Neck Rescue Squad, Inc., 75 N.C. App. 444, 331 S.E.2d 695, cert. denied, 314 N.C. 329, 333 S.E.2d 486 (1985).

**Article 1, Chapter 127B, regulating businesses dealing in military goods, is constitutional** under the due process and equal protection provisions of the State and federal Constitutions. Poor Richard's, Inc. v. Stone, 322 N.C. 61, 366 S.E.2d 697 (1988).

The provisions of G.S. 127B-1 are not unreasonably burdensome within the meaning of this section and N.C. Const., Art. I, § 1. Poor Richard's, Inc. v. Stone, 322 N.C. 61, 366 S.E.2d 697 (1988).

The classification created by G.S. 127B-1 is not so arbitrary or unreasonable as to be violative of the equal protection requirement. Poor

Richard's, Inc. v. Stone, 322 N.C. 61, 366 S.E.2d 697 (1988).

**State's failure to take and to preserve an additional breath sample for independent testing** by defendant or to produce the control and test ampules for defendant's breathalyzer examination did not violate state or federal due process. State v. Jones, 106 N.C. App. 214, 415 S.E.2d 774 (1992).

**Motor Vehicle Provisions.** — The statutory requirement that the operator of a motorcycle on a public highway wear a protective helmet is constitutional as a valid exercise of the police power, since the statute bears a real and substantial relationship to public safety. State v. Anderson, 275 N.C. 168, 166 S.E.2d 49 (1969).

Exemption of manufacturers and dealers of trailers of less than 4,000 pounds empty weight from the bonding requirement of G.S. 20-288(e) did not deny plaintiff equal protection of the law, since the difference in treatment between trailers over 4,000 pounds and trailers less than 4,000 pounds has a reasonable basis in relation to the purpose of the statute. Butler v. Peters, 52 N.C. App. 357, 278 S.E.2d 283, appeal dismissed, 303 N.C. 543, 281 S.E.2d 391 (1981).

**Nuisances.** — Section 19-1 et seq., providing for the abatement of public nuisances by temporary order without bond, and the sale of the personalty and the closing of the property for one year upon the finding of the jury, is constitutional. State ex rel. Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938).

**Obscenity.** — Where, in an obscenity trial, the trial judge declined to judicially restrict or expand the term "community," permitting the jurors to apply the standards of the community from which they came in much the same manner as they would determine the propensities of a reasonable person in other areas of the law, neither G.S. 14-190.1 nor the judge's instructions contravened the Constitution by failing to specify what is meant by "community." State v. Mayes, 86 N.C. App. 569, 359 S.E.2d 30 (1987), petition allowed as to additional issues, 321 N.C. 122, 361 S.E.2d 599 (1987), aff'd, 323 N.C. 159, 371 S.E.2d 476 (1988), cert. denied, 488 U.S. 1009, 109 S. Ct. 792, 102 L. Ed. 2d 784 (1989).

**Occupational Licenses.** — For case upholding act licensing hauling of lumber, see State v. Bullock, 161 N.C. 223, 75 S.E. 942 (1912). See also, Dalton v. George C. Brown & Co., 159 N.C. 175, 75 S.E. 40, 42 L.R.A. (n.s.) 506 (1912); Southeastern Express Co. v. City of Charlotte, 186 N.C. 668, 120 S.E. 475 (1923).

Statute making certain war veterans eligible for license to practice barbering without standing an examination did not violate this section. Motley v. State Bd. of Barber Exmrs., 228 N.C. 337, 45 S.E.2d 550, 175 A.L.R. 253 (1947).

**Licensing Requirement for Sale of Preneed Funeral Goods and Services.** — Provision of G.S. 90-210.67(a) which prohibited persons from offering or selling preneed funeral contracts without holding a license issued by the North Carolina Board of Mortuary Science was rationally related to the State's need to protect consumers, and the appellate court held that the statute did not violate the substantive due process or equal protection rights of a cemetery owner that was sued by the Board after it learned that the owner was selling preneed caskets without a license. N.C. Bd. of Mortuary Sci. v. Crown Mem'l Park, L.L.C., 162 N.C. App. 316, 590 S.E.2d 467, 2004 N.C. App. LEXIS 113, appeal dismissed, 358 N.C. 235, 595 S.E.2d 154 (2004).

**Ordinance which required escort bureaus to keep a record of transactions** with clients or customers was vague and overbroad and violated this section; the sweep of the ordinance infringed on rights of association guaranteed by U.S. Const., Amend. I. Treants Enters., Inc. v. Onslow County, 94 N.C. App. 453, 380 S.E.2d 602 (1989).

**Parental Liability.** — Section 1-538.1, imposing liability on parents for malicious destruction of school property by their child, is within the police power of this State and is not violative of the provisions of this section or of U.S. Const., Amend. V. General Ins. Co. of Am. v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

**A provision of a city ordinance requiring paved parking lots,** challenged on due process and equal protection grounds, was held valid. Grace Baptist Church v. City of Oxford, 320 N.C. 439, 358 S.E.2d 372 (1987).

**Parole Provisions.** — Former G.S. 148-62 did not deprive a defendant of liberty other than by the law of the land on grounds that it failed to provide adequate standards to guide the Board of Paroles in exercise of the discretionary power granted to it. Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788, aff'd, 279 N.C. 556, 184 S.E.2d 259 (1971).

**Revocation of Time Erroneously Credited for Home Detention.** — The trial court's revocation of defendant's credit for time spent under house arrest prior to her entry of plea did not violate her constitutional right against double jeopardy because the restraints ordered were properly imposed to ensure her presence at the trial and to disable her from committing other offenses. State v. Jarman, 140 N.C. App. 198, 535 S.E.2d 875, 2000 N.C. App. LEXIS 1103 (2000).

**Pretrial Discovery.** — Section 1A-1, Rule 26(b) is not unconstitutional on the grounds that it deprives one of property without due process of law, authorizes an unreasonable search and seizure, denies equal protection of the laws, or impairs the right to contract.

Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

**Punitive Damages Cap Not Vague.** — G.S. 1D-25 is not unconstitutionally vague because the court can apply the rules of statutory construction to discern a meaning from G.S. 1D-25 that can be uniformly administered. Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004).

**Eligibility to Receive Child Care Benefits.** — Division of Social Services' definition of "family" and the relevant eligibility criterion used in distinguishing among those eligible to receive child care benefits intended to foster a fair meeting out of state and federal funds to promote the objectives of the social services programs and as such are rationally related to the State's legitimate objectives. Harris v. Flaherty, 90 N.C. App. 110, 367 S.E.2d 364 (1988).

**Rate Increases.** — Exploration tracking rate increases were not in violation of equal protection by virtue of having been made without any attempt to determine which customers would benefit, since it was within the authority of the commission to determine that all gas ratepayers would benefit from increased supplies of natural gas, both through assured availability and improvement in the State's economy. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

**Right to Work Laws.** — Statutes declaring that the right to work shall not be dependent upon membership or nonmembership in a labor union and prohibiting certain agreements between employers and labor organizations do not violate this section. State v. Whitaker, 228 N.C. 352, 45 S.E.2d 860 (1947), aff'd, 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212 (1949).

**Scholarships.** — The provisions of former G.S. 116-149 (b), defining those eligible for scholarships as children of veterans resident of North Carolina at the time of induction or a veteran's child who was born in North Carolina and had lived here continuously since birth were not unconstitutional as discriminating against children of disabled veterans who had moved their residence to this State after birth of the children. Ramsey v. North Carolina Veterans Comm'n, 261 N.C. 645, 135 S.E.2d 659 (1964).

**Short Form Murder Indictment Lacking Elements of Premeditation and Deliberation Upheld.** — The court rejected the defendant's argument that because the indictment failed to allege two essential elements of first degree murder, i.e., premeditation and deliberation, his conviction of first degree murder based thereon violated Article I, §§ 19, 22 and 23 of the North Carolina Constitution. The court found that the defendant had adequate notice of the charge against him, as North Carolina has for nearly 100 years authorized the use of the short form murder indictment as sufficient to allege the elements of premeditation and deliberation, and the jury was properly required to find those elements beyond a reasonable doubt. State v. Holder, 138 N.C. App. 89, 530 S.E.2d 562, 2000 N.C. App. LEXIS 552 (2000).

**Sterilization Provisions.** — The sterilization of mentally ill or retarded persons under former G.S. 35-36 through 35-50, inclusive, is a valid and reasonable exercise of the police power. These sections provide a sufficient judicial standard, and are not unconstitutionally vague or arbitrary, and do not violate the equal protection clauses of the United States or North Carolina Constitutions. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

**Teachers.** — It was not a denial of equal protection for the State to prescribe one procedure for the dismissal of a school teacher during the school year on the ground of immoral or disreputable conduct or failure to perform the teacher's contract, and to prescribe a different procedure for the termination of the employment at the end of the school year under former G.S. 115-142. The vast difference in the consequences of these two actions, insofar as the future effect upon the teacher's professional standing and ability to obtain employment was concerned, was ample basis for classification within the limits of U.S. Const., Amend. XIV and of this section. Still v. Lance, 279 N.C. 254, 182 S.E.2d 403 (1971).

A regulation of the State Board of Education which requires all teachers employed in the public school system of North Carolina to obtain a renewal of their teaching certificates every five years and prescribes for all teachers the same number of credits and the same methods for obtaining such credits does not deny equal protection of the law, notwithstanding the fact that the regulation does not apply to employees of the Board who are not engaged in teaching, whose duties are performed in the Board's offices. Since the purpose of requiring a certificate to teach is to assure good quality of performance in the classroom, there is an obvious and reasonable basis for making the rule applicable to those who teach and omitting from its applicability those who do not. Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

**The Preambles to the Ethical Principles of Psychologists** are unconstitutionally vague for purposes of being cited for specific violations under U.S. Const., Amends. V and XIV and under this section of the N.C. Const. White v. North Carolina State Bd. of Exmrs. of Practicing Psychologists, 97 N.C. App. 144, 388 S.E.2d 148, appeal dismissed and cert. denied, 326 N.C. 601, 393 S.E.2d 891 (1990).

**Ethical Principles of Psychologists.** — Principles 1f, 2e, 3c, 3d, 5c, 7b, 8c, and 8d, are not unconstitutionally vague. White v. North Carolina State Bd. of Exmrs. of Practicing Psychologists, 97 N.C. App. 144, 388 S.E.2d 148, appeal dismissed and cert. denied, 326 N.C. 601, 393 S.E.2d 891 (1990).

**Tuition.** — As to the constitutionality of a six-month nonattendance requirement to qualify for in-state tuition, see Glusman v. Trustees of Univ. of N.C., 281 N.C. 629, 190 S.E.2d 213 (1972), vacated on other grounds, 412 U.S. 947, 93 S. Ct. 2999, 37 L. Ed. 2d 999 (1973).

**Visually Impaired.** — Visually impaired plaintiff could not bring suit under this section, where G.S. 168A-2 provides an adequate state remedy for the plaintiff's allegation that a judge discriminated against him by refusing to allow his companion dog to accompany him into the judge's courtroom. Stroud v. Harrison, 131 N.C. App. 480, 508 S.E.2d 527 (1998).

**Water and Sewage.** — The delegation of authority to counties to construct water and sewer systems does not violate this section. Ramsey v. Rollins, 246 N.C. 647, 100 S.E.2d 55 (1957).

A statute prohibiting a city from charging residents of adjacent sanitary districts for water at a higher rate than is charged residents of the city does not violate this section. Candler v. City of Asheville, 247 N.C. 398, 101 S.E.2d 470 (1958).

The expenditure of funds for the construction of water and sewerage facilities by a municipality, outside its corporate limits, if done pursuant to legislative authority, is for a public purpose and is not violative of this section. Thomasson v. Smith, 249 N.C. 84, 105 S.E.2d 416 (1958).

**Water Supply Water Protection Act.** — The Water Supply Water Protection Act (WSWPA) does not violate the Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 19 of the Constitution of North Carolina because it is not applied equally throughout the state as the 1993 amendment may be expunged for being unconstitutional, which leaves the WSWPA. Town of Spruce Pine v. Avery County, 346 N.C. 787, 488 S.E.2d 144 (1997).

**Wills.** — Former G.S. 30-3(b), which provided that a second or successive spouse who dissented from the will of his deceased spouse should take only one half the amount provided for the surviving spouse if the testator had surviving him lineal descendants by a former marriage but there were no surviving lineal descendants by the second or successive marriage, was not arbitrarily discriminatory and capricious so as to be violative of the due process provisions of the federal and State Constitutions. Vinson v. Chappell, 275 N.C. 234, 166 S.E.2d 686 (1969).

**Wrongful Death.** — Former G.S. 28-174(a)(4)b and c, allowing recovery for services rendered to decedent and for loss of society in a wrongful death action, were not unconstitutionally vague and therefore violative of this section. See Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

**Zoning.** — Landowner's procedural and substantive due process claims arising from enactment of an invalid amendment to a development ordinance failed on summary judgment; there was no procedural due process violation because the landowner had actual notice prior to a hearing on the amendment, and there was no substantive due process violation because the landowner did not have a vested right under North Carolina law to develop the property. Molamphy v. Town of S. Pines, — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 3594 (M.D.N.C. Mar. 3, 2004).

### B. Statutes, Proceedings, etc., Held Unconstitutional.

**A county ordinance subjecting businesses which provided male or female "companionship" to various licensing requirements** was held to lack any rational, real and substantial relation to any valid objective of the county and thus to offend this section and N.C. Const., Art. I, § 1. Treants Enters., Inc. v. Onslow County, 83 N.C. App. 345, 350 S.E.2d 365 (1986), aff'd, 320 N.C. 776, 360 S.E.2d 783 (1987).

An ordinance enacted to regulate business providing male and female companionship was overbroad and not rationally related to a substantial government purpose and violated our State Constitution. Treants Enters., Inc. v. Onslow County, 320 N.C. 776, 360 S.E.2d 783 (1987).

**Criminal Provisions.** — The provisions of former G.S. 115-253 relating to approval by the State Board of Education of the instructional and sales methods and solicitors of nonresident business, trade or correspondence schools were clearly an unwarranted delegation of legislative power, and a conviction and punishment under the criminal provisions thereof violated "the law of the land" under this section. State v. Williams, 253 N.C. 337, 117 S.E.2d 444 (1960).

Section 14-72.2 violates the provisions of this section and of U.S. Const., Amend. XIV and accordingly, it is void. State v. Graham, 32 N.C. App. 601, 233 S.E.2d 615 (1977).

Chapter 269 of the 1975 North Carolina Session Laws, which prohibits the deliberate shining of an artificial light from a motor-driven conveyance beyond the surface of a roadway or in any field, woodland or forest in an area frequented or inhabited by wild game animals during certain evening hours in specified counties, violates due process because it is so overbroad as to constitute arbitrary and unreasonable interference with innocent conduct and it lacks any rational, real or substantial relation to the public health, morals, order, safety or general welfare. State v. Stewart, 40 N.C. App. 693, 253 S.E.2d 638 (1979).

**Fair Trade.** — The "nonsigner" provision of former G.S. 66-56 was unconstitutional, insofar as it purported to extend to one not a party thereto the effect of a fair trade contract, because it deprived the nonsigner of liberty, contrary to the law of the land, in violation of this section. Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc., 285 N.C. 467, 206 S.E.2d 141 (1974).

**Deprivation of Property.** — The first sentence of subsection (b) of G.S. 1-44.2 is unconstitutional because it does not provide sufficient notice, an opportunity to be heard, and just compensation before divesting owner of a valuable property interest. The remaining portions of that section were not challenged and remain in full force and effect. McDonald's Corp. v. Dwyer, 338 N.C. 445, 450 S.E.2d 888 (1994).

**Fee Waiver Policy.** — Fee waiver policy adopted by city board of education was unconstitutional where it failed to establish a mechanism by which the schools would affirmatively notify students and their parents of the availability of a waiver or reduction of the fee or by which the students or parents themselves might apply for a partial or complete exemption from the fee requirements, since the waiver policy did not fairly guarantee to low income and indigent students their right of equal access to the educational opportunities available at their schools and did not accord procedural due process to such students. Sneed v. Greensboro City Bd. of Educ., 299 N.C. 609, 264 S.E.2d 106 (1980).

**Insurance Provisions.** — The State may not, consistent with the law of the land clause of this section or the due process clause of U.S. Const., Amend. XIV, require an insurance company to engage in the health care liability insurance business as a condition to its right to continue to carry on an entirely different business for which it is duly licensed by the State and in which it wants to be, and is, engaged. Hartford Accident & Indem. Co. v. Ingram, 290 N.C. 457, 226 S.E.2d 498 (1976).

**Medical Facility Licensing.** — For case holding former G.S. 90-291, relating to the determination of need for medical care facilities, unconstitutional, see In re Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

**Military Property Sales Facilities.** — If the State's primary purpose in Article 1 of Chapter 127B is to prevent the owners of military property sales businesses from illegally purchasing property which they believe may be stolen, that section cannot stand, as the State may not undertake by regulation to rid ordinary occupations and callings of the dishonest; likewise, if the State, by this regulatory statute, is seeking to enlist plaintiff's aid in enforcing already existing criminal laws, either by allowing the State to trace the property to its criminal source, or to deter its disposition, and, therefore, its theft, it is also unconstitutional, as those who buy and sell military surplus property may not be required to incur additional expense, or abandon that part of their business, to assist in enforcing criminal laws. Poor Richard's, Inc. v. Stone, 86 N.C. App. 137, 356 S.E.2d 828 (1987).

Article 1 of Chapter 127B, concerning military property sales facilities, violates this section, as assuming arguendo that the State's police power extends to aiding the federal government in preventing theft from U.S. military bases, the statute is an unreasonable, and therefore unconstitutional, means of achieving that purpose. Poor Richard's, Inc. v. Stone, 86 N.C. App. 137, 356 S.E.2d 828 (1987).

**Occupational Licenses.** — For case holding a portion of G.S. 90-115, relating to the practice of optometry, violative of this section, see Palmer v. Smith, 229 N.C. 612, 51 S.E.2d 8 (1948).

Statute providing for licensing and supervision of photographers held violative of this section. State v. Ballance, 229 N.C. 764, 51 S.E.2d 731 (1949).

Former G.S. 87-28 et seq., requiring a license for any person, firm or corporation undertaking to lay, set or install ceramic tile, marble or terrazzo floors or walls, violated this section. Roller v. Allen, 245 N.C. 516, 96 S.E.2d 851 (1957).

**Real Estate Brokers.** — The amendment to G.S. 93A-2(a) enacted by Session Laws 1975, c. 108, was unconstitutional as repugnant to this section. North Carolina Real Estate Licensing Bd. v. Aikens, 31 N.C. App. 8, 228 S.E.2d 493 (1976).

**Receivership.** — To permit an operating receiver to hazard the property rights of lienholders without their consent in a perilous private enterprise merely because the court may entertain the uncertain hope that some pecuniary advantage might thereby be obtained for the general creditors or some other third persons would transgress the basic concept enshrined in this section that no person may be deprived of his property except by his own consent or the law of the land. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

**Street Improvements.** — A municipal ordinance requiring a railway company to pay the entire expense of rebuilding an overpass trestle to accommodate the opening of a new street was, under the facts, an unreasonable exercise of the police power, amounting to an invasion of the company's property rights in violation of the constitutional guarantee provided by this section. City of Winston-Salem v. Southern Ry., 248 N.C. 637, 105 S.E.2d 37 (1958).

**Removal of state and local employees' tax exemption for retirement benefits** constituted a taking of property without just compensation. Bailey v. State, 348 N.C. 130, 500 S.E.2d 54 (1998).

**Workers' Compensation Recovery Provision.** — Court of Appeals of North Carolina holds that the time limitation in the fourth paragraph of G.S. 97-61.6 violates the Equal Protection Clauses of U.S. Const., Amend. XIV and N.C. Const., Art. I, § 19 under the rational basis test because the statute imposes an additional burden for recovery — a shorter time frame for death benefits claims — for asbestosis or silicosis, and no rational basis exists for treating such occupational diseases differently from other latent occupational diseases. Payne v. Charlotte Heating & Air Conditioning, 172 N.C. App. 496, 616 S.E.2d 356, 2005 N.C. App. LEXIS 1782 (2005).

### C. Sunday Closing Laws.

**Generally.** — This section does not deprive the legislature of authority to prohibit by a statute, otherwise valid, the carrying on of and engaging in, on Sunday, any and all labor and the operation of industrial and commercial pursuits, except for works of necessity and acts which, themselves, are in exercise of the constitutional right to worship. Moreover, the legislature may delegate this power to municipalities. Raleigh Mobile Home Sales, Inc. v. Tomlinson, 276 N.C. 661, 174 S.E.2d 542 (1970).

Neither the State nor the federal Constitution requires that a statute or ordinance, enacted for establishing Sunday as a day of rest, be held invalid unless it prohibits every activity which could be brought within its scope. Raleigh Mobile Home Sales, Inc. v. Tomlinson, 276 N.C. 661, 174 S.E.2d 542 (1970).

The legislative body has a wide discretion in determining which activities do and which do not interfere with the observance of Sunday as a day of general rest and relaxation sufficiently to justify the prohibition of those activities on that day, and the burden rests upon the person complaining to establish the absence of a reasonable basis for such determination. Raleigh Mobile Home Sales, Inc. v. Tomlinson, 276 N.C. 661, 174 S.E.2d 542 (1970).

Where the objective of a municipal ordinance is the establishment of Sunday as a day of general rest and relaxation, the difference in treatment by the ordinance of two types of business must be supported by a reasonable basis for the conclusion that one, substantially more than the other, will interfere with such use and enjoyment of the day. Raleigh Mobile Home Sales, Inc. v. Tomlinson, 276 N.C. 661, 174 S.E.2d 542 (1970).

The general rule is that the enactment of Sunday regulations is a legitimate exercise of the police power, and that the classification on which a Sunday law is based is within the discretion of the legislative branch of the government or within the discretion of the governing body of a municipality clothed with power to enact and enforce ordinances for the observance of Sunday, and will be upheld, provided the classification is founded upon reasonable distinctions, affects all persons similarly situated or engaged in the same business without discrimination, and has some reasonable relation to the public peace, welfare and safety. State v. Greenwood, 280 N.C. 651, 187 S.E.2d 8 (1972).

The validity of a Sunday closing statute or ordinance depends upon its reasonable relation to the accomplishment of the State's legitimate objective, which, in this instance, is the promotion of the public health, safety, morals, and welfare by the establishment of a day of rest and relaxation. Legislation for this purpose, like other legislation, may not discriminate arbitrarily either as between persons, or groups of persons, or as between activities which are prohibited and those which are permitted. State v. Greenwood, 280 N.C. 651, 187 S.E.2d 8 (1972).

In order for a Sunday closing ordinance to withstand an attack upon its constitutionality, it is not necessary that the legislative body prohibited everything which is detrimental to the public morals, health or safety; it is sufficient that there is reasonable basis for belief that the operation on the day of rest of excepted businesses is necessary or conducive to the enjoyment by the public of the designated day as a day of rest, and that the activities of the defendant are not. State v. Atlas, 283 N.C. 165, 195 S.E.2d 496 (1973).

Unconstitutional discrimination in a county ordinance requiring businesses generally to be closed on a specified day of the week, designated by the legislative body as a day of rest, but exempting from such requirement certain types of business, is not shown by the fact that the ordinance of some other county or municipality does not contain identical exemptions from its general closing requirement. State v. Atlas, 283 N.C. 165, 195 S.E.2d 496 (1973).

**Illustrative Cases.** — An ordinance prohibiting certain activities on Sunday held not in contravention of this section. State v. McGee, 237 N.C. 633, 75 S.E.2d 783, appeal dismissed, 346 U.S. 802, 74 S. Ct. 50, 98 L. Ed. 334 (1953), rehearing denied, 346 U.S. 918, 74 S. Ct. 272, 98 L. Ed. 413 (1954).

An ordinance prohibiting generally the operation of all businesses within a municipality on Sunday, but excepting certain businesses, was held not to violate this section. Clark's Charlotte, Inc. v. Hunter, 261 N.C. 222, 134 S.E.2d 364 (1964).

Ordinances prohibiting the exercise of all occupations generally on Sunday, "except those of necessity and charity," are constitutional, and exceptions are valid if they are reasonable and do not discriminate within a class between competitors similarly situated. Charles Stores Co. v. Tucker, 263 N.C. 710, 140 S.E.2d 370 (1965).

The classification of night clubs into those "located within 300 yards of the property on which is located any public school or church building" and all others, for the purpose of closing the former from 2:00 A.M. until 12:00 midnight on Sunday, was both unreasonable and discriminatory. State v. Smith, 265 N.C. 173, 143 S.E.2d 293 (1965).

A Sunday observance ordinance which classified "sporting goods and toys" as prohibited items and live bait as permitted items could not be considered unreasonable, arbitrary or discriminatory. S.S. Kresge Co. v. Tomlinson, 275 N.C. 1, 165 S.E.2d 236 (1969).

A municipal ordinance which prohibited the sale on Sunday of mobile homes but which did not prohibit the sale of conventional homes would be held valid, since a classification based on the differences between the two types of selling (presence or absence of traffic, congestion, and noise) bore a reasonable relation to the purpose of the ordinance in establishing Sunday as a day of rest and relaxation. Raleigh Mobile Home Sales, Inc. v. Tomlinson, 276 N.C. 661, 174 S.E.2d 542 (1970).

A Sunday closing ordinance which singled out and banned the operation of billiard halls on Sunday but permitted other businesses which provided facilities for recreation, sports and amusements, which were potentially equally disruptive, violated the equal protection clauses of the North Carolina and United States Constitutions. State v. Greenwood, 280 N.C. 651, 187 S.E.2d 8 (1972).

### OPINIONS OF ATTORNEY GENERAL

**Housing of Inmates from Other States in Private Prisons.** — North Carolina can permanently ban the housing of inmates from other states in private prisons if they are not federal inmates. See opinion of Attorney General to Senator Frank W. Ballance, Jr. and Representative E. David Redwine, 2001 N.C. AG LEXIS 5 (3/28/2001).

## Sec. 20. General warrants.

General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.

**Cross References.** — As to searches and seizures, see G.S. 15A-231. As to search warrants, see G.S. 15A-241.

**History.** — The provisions of this section are similar to those of Art. I, § 15, Const. 1868.

**Legal Periodicals.** — For discussion of statute enacted pursuant to this provision, see 15 N.C.L. Rev. 101 (1937).

As to limitations on investigating officers, see 15 N.C.L. Rev. 229 (1937).

For case law survey as to searches and seizures, see 45 N.C.L. Rev. 931 (1967).

For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

For note on warrantless aerial surveillance endorsed in California v. Ciraolo, 476 U.S. 207, 106 S. Ct. 1809, 90 L. Ed. 2d 210, rehearing denied, 478 U.S. 1014, 106 S. Ct. 3320, 92 L. Ed. 2d 728 (1986), see 9 Campbell L. Rev. 497 (1987).

For note, "North Carolina Adopts the Inevitable Discovery Exception to the Exclusionary Rule: — State v. Garner," see 15 Campbell L. Rev. 305 (1993).

For article, Hobgood, I-95 A/K/A The Drug Trafficker's Freeway, and Its Impact on State Constitutional Law, see 21 Campbell L. Rev. 237 (1999).

For note on determining reasonable, articulable suspicion from the totality of the circumstances in two North Carolina stop and frisk cases, see 78 N.C.L. Rev. 539 (2000).

### CASE NOTES

I. General Consideration.
II. Warrantless Searches.
III. Search Warrants.

## I. GENERAL CONSIDERATION.

***Editor's Note.*** *— Some of the cases cited below were decided under former Art. I, § 15, Const. 1868.*

**Search and Seizure Requirements Under U.S. Const., Amend. IV Compared.** — Though the language in this section, providing in substance that any search or seizure must be "supported by evidence," is markedly different from that in the federal Constitution, there is no variance between the search and seizure law of North Carolina and the requirements of U.S. Const., Amend. IV as interpreted by the Supreme Court of the United States. State v. Hendricks, 43 N.C. App. 245, 258 S.E.2d 872 (1979), cert. denied, 299 N.C. 123, 262 S.E.2d 6 (1980).

Pointing to the differences in language in the Fourth Amendment of the United States Constitution and this section of the North Carolina Constitution, the North Carolina Constitution is more protective of a person's privacy and requires a stricter standard in justifying a warrantless search. State v. Mills, 104 N.C. App. 724, 411 S.E.2d 193 (1991).

The language of this section differs markedly from the language of U.S. Const., Amend. IV. Nevertheless, this section prohibits unreasonable searches and seizures. State v. Arrington, 311 N.C. 633, 319 S.E.2d 254 (1984).

**This section does not require more particularity in subpoenas than does U.S. Const., Amend. IV** as applied to the states through U.S. Const., Amend. XIV. In re Computer Technology Corp., 78 N.C. App. 402, 337 S.E.2d 165 (1985).

**Other State Remedies Must Be Exhausted.** — A state constitutional action is not proper under this section, unless no other state remedy is available; here, an existing state tort remedy precluded plaintiff's assault-based constitutional claim against an arresting officer. Glenn-Robinson v. Acker, 140 N.C. App. 606, 538 S.E.2d 601, 2000 N.C. App. LEXIS 1258 (2000).

**Standing to Object to Search.** — Burglary defendant had no standing to object to the search of a car from which evidence was taken by the FBI where, although defendant had paid $3,500 of the $4,000 purchase price, the owner of the car dealership retained title and had given his consent to the search. State v. Mandina, 91 N.C. App. 686, 373 S.E.2d 155 (1988).

Defendant did not have standing to contend that the search and seizure of a briefcase and its contents violated his rights under the Fourth Amendment to the United States Constitution and § 20 of the North Carolina Constitution, where the defendant presented no evidence that he asserted any ownership or possessory interest in the briefcase. State v. Cohen, 117 N.C. App. 265, 450 S.E.2d 503 (1994).

**Abandoned Property.** — For abandonment to occur, the discarding of property must occur in a public place; one simply cannot abandon property within the curtilage of one's own home. State v. Reed, 182 N.C. App. 109, 641 S.E.2d 320, 2007 N.C. App. LEXIS 474 (2007), cert. denied, 361 N.C. 701, 653 S.E.2d 155 (2007), State v. Reed, 182 N.C. App. 109, 641 S.E.2d 320, 2007 N.C. App. LEXIS 474 (2007).

**No Expectation of Privacy in Property Relinquished to Another.** — When one voluntarily puts property under the control of another, he must be viewed as having relinquished any prior legitimate expectation of privacy with regard to that property, as it becomes subject to public exposure upon the whim of the other person. State v. Phillips, 132 N.C. App. 765, 513 S.E.2d 568 (1999).

**An ex parte order from the superior court, directing officials of a certain corporation to make available certain records** pertaining to its transactions with two other corporations and with the City of Charlotte, incident to an investigation into possible fraud and irregularities in the purchasing of parts, equipment and services by the city, was not an administrative search warrant to which the strictness of U.S. Const., Amend. IV, this section and G.S. 15-27.2 would apply; and where such order was neither unreasonably broad nor indefinite, its issuance would be affirmed. In re Computer Technology Corp., 78 N.C. App. 402, 337 S.E.2d 165 (1985).

**Guilty as Well as Innocent Protected.** — The fundamental law protects a person from the search of his private dwelling without a warrant, which protection extends to all equally, the guilty as well as the innocent. State v. Mills, 246 N.C. 237, 98 S.E.2d 329 (1957).

The protection against illegal search extends to the justly, as well as to the unjustly, accused. State v. Hall, 264 N.C. 559, 142 S.E.2d 177 (1965), overruled on other grounds, State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

**"Search" Defined.** — A search ordinarily implies a quest by an officer of the law, a prying into hidden places for that which is concealed. State v. Raynor, 27 N.C. App. 538, 219 S.E.2d 657 (1975).

**Fact of Search Must Be Established.** — Before the legality of an alleged search may be questioned, it is necessary to first determine whether there has actually been a search. State v. Raynor, 27 N.C. App. 538, 219 S.E.2d 657 (1975).

**Reasonable suspicion is the necessary standard** for traffic stops, regardless of whether a traffic violation was readily observed or merely suspected, and to the extent language in State v. Ivey, 360 N.C. 562, 633 S.E.2d 459 (2006), may be interpreted as requiring probable cause, the North Carolina Supreme Court specifically disavows that interpretation. State v. Styles, 362 N.C. 412, 665 S.E.2d 438, 2008 N.C. LEXIS 685 (2008).

**Protection Extends Only to Unreasonable Searches.** — Constitutional protection does not extend to all searches and seizures, but only to those which are unreasonable. State v. Turnbull, 16 N.C. App. 542, 192 S.E.2d 689 (1972); State v. Frederick, 31 N.C. App. 503, 230 S.E.2d 421 (1976).

The guarantees of this section protect against unreasonable searches and seizures. They are designed for the protection of the innocent. State v. Ellington, 284 N.C. 198, 200 S.E.2d 177 (1973).

**Including Brief Investigatory Traffic Stops.** The constitutional prohibition of unreasonable seizures of the person apply to brief investigatory traffic stops. State v. Schiffer, 132 N.C. App. 22, 510 S.E.2d 165 (1999).

**Traffic Stop was not Unconstitutional.** — Trial court's finding that at the time defendant's vehicle changed lanes without a signal, it was being operated by defendant immediately in front of an arresting officer's vehicle indicated that defendant's failure to signal violated G.S. 20-154(a) because it was clear that changing lanes immediately in front of another vehicle might affect the operation of the trailing vehicle; the officer's observation of the traffic violation gave him the required reasonable suspicion to stop defendant's vehicle such that the stop was not unconstitutional. State v. Styles, 362 N.C. 412, 665 S.E.2d 438, 2008 N.C. LEXIS 685 (2008).

**Reasonable Suspicion for Investigatory Stop.** — As a general rule, a stop made for investigatory purposes is reasonable, and therefore constitutional, when the investigating officer has a reasonable suspicion, supported by articulable facts, that the person seized may have engaged in or may be engaged in criminal activity. State v. Schiffer, 132 N.C. App. 22, 510 S.E.2d 165 (1999).

The level of suspicion required for an investigatory stop is lower than what is required for a seizure based on probable cause, which is a suspicion produced by such facts as indicate a fair probability that the person seized has engaged in or is engaged in criminal activity. State v. Schiffer, 132 N.C. App. 22, 510 S.E.2d 165 (1999).

Defendant was not illegally seized in contravention of his constitutional rights, as an officer did not tell defendant he could not leave, defendant had consented to speak with the officer, and the officer had not restrained defendant's freedom to walk away. Defendant had no driver's license with him and did not know the name of a friend to whom his car belonged; these articulable facts were sufficient to give rise to a reasonable suspicion in the mind of a trained police officer that defendant was involved in criminal activity, and the trial court did not err in denying defendant's motion to suppress. State v. Campbell, 359 N.C. 644, 617 S.E.2d 1, 2005 N.C. LEXIS 842 (2005).

Reasonable, articulable suspicion of criminal activity justifying the stop of defendant's vehicle did not exist where a detective only observed defendant weaving within defendant's lane and the detective did not observe defendant violating any laws such as driving above or below the speed limit. Furthermore, defendant was stopped during the afternoon, not an unusual hour, and there was no evidence that defendant was near any places that sold alcohol. State v. Fields, — N.C. App. —, 673 S.E.2d 765, 2009 N.C. App. LEXIS 254 (2009).

**Unreasonable Search Defined.** — North Carolina has defined an unreasonable search as an examination or inspection without authority of law of one's premises or person with a view to the discovery of some evidence of guilt to be used in the prosecution of a criminal action. State v. Turnbull, 16 N.C. App. 542, 192 S.E.2d 689 (1972).

**Except in certain cases, a search of private property without proper consent is "unreasonable"** unless it has been authorized by a valid search warrant. State v. Frederick, 31 N.C. App. 503, 230 S.E.2d 421 (1976).

**The reasonableness of the search is in the first instance a substantive determination** to be made by the trial court from the facts and circumstances of the case in the light of the criteria laid down by U.S. Const., Amend. IV and opinions which apply that amendment. State v. Turnbull, 16 N.C. App. 542, 192 S.E.2d 689 (1972).

**An unlawful search does not become lawful by the discoveries which result** from it. State v. Hall, 264 N.C. 559, 142 S.E.2d 177 (1965), overruled on other grounds, State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

**And evidence which is obtained as a result of an unreasonable search and seizure may not be admitted** in either the State or federal courts. State v. Frederick, 31 N.C. App. 503, 230 S.E.2d 421 (1976); State v. Small, 293 N.C. 646, 239 S.E.2d 429 (1977).

**Confession After Confrontation with Articles Obtained by Illegal Search.** — Where a confession is obtained from defendant after he has been confronted with stolen property recovered from his home in an unlawful search without a warrant, the court must find whether such confession was actually free and voluntary or whether it was triggered by the use of the articles obtained by the illegal search. State v. Hall, 264 N.C. 559, 142 S.E.2d 177 (1965), overruled on other grounds, State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

**Stop and Frisk Procedure.** — Action of law enforcement agents who entered lounge pursuant to a valid search warrant and frisked defendant for weapons was not unconstitutional, since the North Carolina Supreme Court has upheld the "stop and frisk" procedure, and since there is a specific grant of authority in G.S. 15A-255. State v. Davis, 94 N.C. App. 358, 380 S.E.2d 378 (1989).

It is well within the law to conduct a frisk of a defendant for weapons when strictly limited to a determination of whether defendant was armed. State v. Harris, 95 N.C. App. 691, 384 S.E.2d 50 (1989), aff'd, 326 N.C. 588, 391 S.E.2d 187 (1990).

**Duty of Trial Court.** — The trial court has a duty to pass upon the validity of a search and the competency of evidence procured thereunder when properly made the subject of inquiry. State v. Thompson, 15 N.C. App. 416, 190 S.E.2d 355, cert. denied, 282 N.C. 307, 192 S.E.2d 197 (1972).

**Judge Issuing Search Warrant May Review Its Validity.** — There is no statutory or constitutional proscription in North Carolina against a judge's presiding at a hearing to review the validity of a search warrant issued by that judge. State v. Brown, 20 N.C. App. 413, 201 S.E.2d 527, appeal dismissed, 285 N.C. 87, 204 S.E.2d 21 (1974).

**Waiver.** — By a voluntary waiver and consent to search, free from coercion, duress or fraud, and not given merely to avoid resistance, a defendant relinquishes the protection of U.S. Const., Amend. IV, which prohibits unreasonable searches and seizures, and also relinquishes the protection given by this section against an unlawful search and seizure. State v. Little, 270 N.C. 234, 154 S.E.2d 61 (1967).

If one voluntarily permits or expressly invites and agrees to a search, being cognizant of his rights, such conduct amounts to a waiver of his constitutional protection. State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968), cert. denied, 393 U.S. 1087, 89 S. Ct. 876, 21 L. Ed. 2d 780 (1969).

**When the evidence is delivered to a police officer upon request** and without compulsion or coercion, there is no search within the constitutional prohibition against unreasonable searches and seizures. State v. Raynor, 27 N.C. App. 538, 219 S.E.2d 657 (1975); State v. Small, 293 N.C. 646, 239 S.E.2d 429 (1977).

**For case refusing to adopt a "good faith" exception to the exclusionary rule,** see State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988).

**Violation Shown.** — Where seizure was a violation of defendant's Fourth Amendment right against unreasonable searches and seizures, the evidence seized had to be suppressed. State v. Artis, 123 N.C. App. 114, 472 S.E.2d 169, 1996 N.C. App. LEXIS 575 (1996), cert. denied, 344 N.C. 633, 477 S.E.2d 45 (1998).

**Motion to Suppress Properly Denied.** — An anticipatory warrant to search the premises when an intercepted package containing contraband was delivered was properly executed where: (1) the warrant clearly established explicit triggering events on its face which were definable and preordained; (2) although the package was no longer in the house when the search occurred, the package was delivered, accepted, and taken into the house by defendant; (3) the delivery of the package linked the house to criminal activity inside, giving rise to probable cause for the search; and (4) the warrant specifically allowed the officers to search the premises to find and seize cocaine generally and to identify the participants of the crime; thus, a trial court correctly denied defendant's motion to suppress evidence seized pursuant to the anticipatory search warrant. State v. Baldwin, 161 N.C. App. 382, 588 S.E.2d 497 (2003).

**Motion to Suppress Properly Denied.** — Trial court properly denied defendant's motion to suppress evidence in the trial of his charge of assault on a law enforcement officer because, even if the police officers' entry into defendant's home was unlawful, the exclusionary rule did not operate to exclude evidence of defendant's assault on the law enforcement officers. State v. Parker, 188 N.C. App. 616, 655 S.E.2d 860, 2008 N.C. App. LEXIS 192 (2008).

**Dog Sniff.** — Trial court's denial of defendant's motion to suppress had to be vacated, as the judgment denying that motion was null and void because it was entered out of county, out of term, and out of session; as a result, the trial court had to hold a new suppression hearing, and at that time the court could consider whether defendant's constitutional rights were violated by a police officer's dog sniff of defendant's vehicle while defendant was detained at a checkpoint used to determine the validity of drivers' licenses and vehicle registrations, which led to the discovery that defendant possessed marijuana and cocaine. State v. Branch, 177 N.C. App. 104, 627 S.E.2d 506, 2006 N.C. App. LEXIS 713 (2006).

**Search Exceeded Scope of Consent.** — Search of defendant's van, which included the officer's removal of a plastic wall panel, exceeded the scope of defendant's consent and thus, violated the Fourth Amendment and N.C. Const., Art. 1, § 20. Among other things, there was no evidence nor finding of fact suggesting that the officer suspected that the van contained contraband or that defendant was involved in criminal conduct. State v. Johnson, 177 N.C. App. 122, 627 S.E.2d 488, 2006 N.C. App. LEXIS 695 (2006).

**Applied** in State v. Allison, 298 N.C. 135, 257 S.E.2d 417 (1979); State v. Warren, 59 N.C. App. 264, 296 S.E.2d 671 (1982); State v. Kornegay, 313 N.C. 1, 326 S.E.2d 881 (1985);

State v. Bromfield, 332 N.C. 24, 418 S.E.2d 491 (1992); State v. Johnson, 143 N.C. App. 307, 547 S.E.2d 445 (2001).

**Cited** in State v. Godette, 188 N.C. 497, 125 S.E. 24 (1924); State v. Crabtree, 286 N.C. 541, 212 S.E.2d 103 (1975); Brooks v. Taylor Tobacco Enters., Inc., 298 N.C. 759, 260 S.E.2d 419 (1979); Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698 (1979); State v. Melvin, 86 N.C. App. 291, 357 S.E.2d 379 (1987); State v. Autry, 321 N.C. 392, 364 S.E.2d 341 (1988); State v. Davis, 96 N.C. App. 545, 386 S.E.2d 743 (1989); State v. Sanders, 327 N.C. 319, 395 S.E.2d 412 (1990); State v. Butler, 331 N.C. 227, 415 S.E.2d 719 (1992); State v. Farmer, 333 N.C. 172, 424 S.E.2d 120 (1993); Boesche v. Raleigh-Durham Airport Auth., 111 N.C. App. 149, 432 S.E.2d 137 (1993); State v. West, 119 N.C. App. 562, 459 S.E.2d 55 (1995); State v. Clyburn, 120 N.C. App. 377, 462 S.E.2d 538 (1995); State v. Chapman, 343 N.C. 495, 471 S.E.2d 354 (1996); State v. Scott, 343 N.C. 313, 471 S.E.2d 605 (1996); State v. Smith, 346 N.C. 794, 488 S.E.2d 210 (1997); State v. Barnes, 158 N.C. App. 606, 582 S.E.2d 313, 2003 N.C. App. LEXIS 1232 (2003); Huber v. N.C. State Univ., 163 N.C. App. 638, 594 S.E.2d 402, 2004 N.C. App. LEXIS 569 (2004); State v. Price, — N.C. App. —, 611 S.E.2d 891 (2005).

## II. WARRANTLESS SEARCHES.

**Plain View Doctrine.** — This section does not prohibit a seizure without a warrant where there is no need of a search, and where the contraband subject matter is fully disclosed and open to the eye and hand. State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968), cert. denied, 393 U.S. 1087, 89 S. Ct. 876, 21 L. Ed. 2d 780 (1969).

The constitutional and statutory guarantee against unreasonable search and seizure does not prohibit seizure of evidence and its introduction into evidence on a subsequent prosecution where no search is required. State v. Simmons, 278 N.C. 468, 180 S.E.2d 97 (1971); State v. Raynor, 27 N.C. App. 538, 219 S.E.2d 657 (1975).

No search warrant is needed to seize items in plain view. State v. Thompson, 15 N.C. App. 416, 190 S.E.2d 355, cert. denied, 282 N.C. 307, 192 S.E.2d 197 (1972); State v. Small, 293 N.C. 646, 239 S.E.2d 429 (1977).

When police officers discover evidence of a crime in plain view, without the necessity of a search, they may seize the evidence without obtaining a search warrant. State v. Young, 21 N.C. App. 369, 204 S.E.2d 556, cert. denied, 285 N.C. 595, 206 S.E.2d 867 (1974).

When contraband material is in plain view no search is necessary, and the constitutional guarantee against unreasonable search and seizure does not prevent either the seizure of the contraband without a warrant or its introduction into evidence. State v. Walker, 25 N.C. App. 157, 212 S.E.2d 528, cert. denied, 287 N.C. 264, 214 S.E.2d 436; 423 U.S. 894, 96 S. Ct. 193, 46 L. Ed. 2d 126, modified and aff'd, 27 N.C. App. 295, 219 S.E.2d 76 (1975).

**When Plain View Rule Applies — Generally.** — The "plain view" rule does not apply unless the police have a right to be at the place where the evidence is discovered. State v. Young, 21 N.C. App. 369, 204 S.E.2d 556, cert. denied, 285 N.C. 595, 206 S.E.2d 867 (1974).

Evidence of crime falling in the plain view of an officer who has a right to be in a position to have that view is subject to seizure and may be introduced into evidence. State v. Mitchell, 300 N.C. 305, 266 S.E.2d 605 (1980), cert. denied, 449 U.S. 1085, 101 S. Ct. 873, 66 L. Ed. 2d 810 (1981).

**Same — When Lawfully on Premises.** — When police officers lawfully enter a person's premises and observe evidence of a crime in plain view, they may seize it without obtaining a search warrant. State v. Carr, 21 N.C. App. 470, 204 S.E.2d 892 (1974).

By being lawfully on the premises officers are entitled to seize such evidentiary objects connected with defendants as are in plain view. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1975).

**Same — While Conducting Lawful Search.** — While conducting a lawful search, where officers found in plain view property identified as that reported missing, these items were lawfully seized. State v. Travatello, 24 N.C. App. 511, 211 S.E.2d 467 (1975).

**Search of Automobiles and Conveyances.** — Automobiles and other conveyances may be searched without a warrant under circumstances that would not justify the search of a house, and a police officer in the exercise of his duties may search an automobile or other conveyance without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile or other conveyance carries contraband materials. State v. Simmons, 278 N.C. 468, 180 S.E.2d 97 (1971).

Where police officers are exercising proper precautionary measures, it is not error to complete the search of defendant's automobile at a scene more tranquil than that at which the arrest was made. State v. Hardy, 17 N.C. App. 169, 193 S.E.2d 459 (1972), cert. denied, 283 N.C. 107, 194 S.E.2d 635; 414 U.S. 999, 94 S. Ct. 352, 38 L. Ed. 2d 235 (1973).

Trial court properly denied the defendant's motion to suppress cocaine found in the trunk of a car defendant rented following a stop of the car for speeding because the trial court determined that a vehicle search by police officers was consensual; and the police officers had a reasonable and articulable suspicion of criminal activity because defendant and the driver of the car gave conflicting stories, the driver avoided direct eye contact with a police officer, and the back seat was full of personal belongings indicating that drugs might be in the trunk. These factors, coupled with the specific experience and training of the officers at the scene, gave rise to reasonable, articulable suspicion. State v. Bell, 156 N.C. App. 350, 576 S.E.2d 695 (2003).

When defendant's vehicle was properly subjected to an investigatory stop, and he was observed reaching under his front seat and then exited his vehicle and refused to comply with orders to get back in his car, police could conduct a protective search of the vehicle. State v. Edwards, 164 N.C. App. 130, 595 S.E.2d 213, 2004 N.C. App. LEXIS 728 (2004), cert. denied, 358 N.C. 735, 603 S.E.2d 879 (2004).

Trial court properly denied defendant's motion to suppress evidence seized from his car after it was stopped for a traffic violation, as the search of the vehicle was based on defendant's unlimited consent, and further, information received from a passenger as to where contraband could be found in the vehicle justified the search under the automobile exception to the warrant requirement, pursuant to U.S. Const., Amend. IV and N.C. Const., Art. I, § 20. State v. Baublitz, 172 N.C. App. 801, 616 S.E.2d 615, 2005 N.C. App. LEXIS 1778 (2005).

Where the police officer stopped defendant for a traffic violation, the officer had a reasonable suspicion pursuant to N.C. Const., Art. I, § 20 and U.S. Const., Amend. IV to expand the scope of the detention; defendant, who was seated next to the officer in the patrol car while the officer wrote a traffic citation, exhibited extremely nervous behavior, including a heartbeat that was visible through defendant's shirt, and defendant gave inconsistent responses as to where defendant was going. State v. Hernandez, 170 N.C. App. 299, 612 S.E.2d 420, 2005 N.C. App. LEXIS 1006 (2005).

Stop of vehicle defendant was riding in violated N.C. Const., Art. I, § 20, because the stop was not justified by a reasonable suspicion based on objective facts; the officer had no suspicion that illegal activity had occurred when the officer stopped the vehicle. State v. Murray, — N.C. App. —, 666 S.E.2d 205, 2008 N.C. App. LEXIS 1656 (2008).

**Probable Cause to Stop Defendant's Vehicle.** — Where a police officer had probable cause to stop defendant's vehicle and defendant was predisposed to commit the crime, the trial court properly denied defendant's motions to suppress and defendant's motion for a jury instruction on entrapment. State v. Reynolds, 161 N.C. App. 144, 587 S.E.2d 456 (2003).

Police officer had probable cause pursuant to U.S. Const., Amend. IV and N.C. Const., Art. I, § 20 to stop defendant's vehicle because the officer witnessed defendant remove his seat belt while driving, a violation of G.S. 20-135.2A(a). State v. Hernandez, 170 N.C. App. 299, 612 S.E.2d 420, 2005 N.C. App. LEXIS 1006 (2005).

Officer had probable cause to stop defendant because the officer, who was traveling behind defendant, saw defendant change lanes without signaling, which was a violation G.S. 20-154(a); the trial court's denial of defendant's motion to suppress evidence seized after the stop was proper. State v. Styles, 185 N.C. App. 271, 648 S.E.2d 214, 2007 N.C. App. LEXIS 1696 (2007).

Traffic stop violated defendant's Fourth Amendment rights since the legal justification for a deputy's stop of defendant's vehicle was not objectively reasonable as the deputy stopped defendant for speeding under a mistaken belief as to the legal speed limit, and it was undisputed that defendant was not exceeding the speed limit; the U.S. and North Carolina Constitutions require an officer who makes a seizure on the basis of a perceived traffic violation to have probable cause to believe the driver's actions violated a motor vehicle law. State v. McLamb, 186 N.C. App. 124, 649 S.E.2d 902, 2007 N.C. App. LEXIS 1981 (2007).

**Drug Search Upheld after Traffic Stop under Wren Rule.** — Where defendant, who had been stopped for speeding and following too closely, presented a nervous appearance, gave vague answers as to ownership of car, and refused permission to search it, court properly found police had probable cause, questioning did not exceed permissible scope of the traffic stop, and detention of defendant was justified and not in violation of defendant's constitutional rights under this section. The Supreme Court further declared subjective motives of police officer immaterial and upheld use of the objective. When rule standard to determine reasonableness of police action, related to probable cause, in view of constitutional concerns. State v. McClendon, 350 N.C. 630, 517 S.E.2d 128 (1999).

**Drug Dog Sniff.** — Where a drug dog sniff was conducted on defendant's vehicle during a traffic stop, defendant's motion to suppress was properly denied because (1) the officers needed no further justification in order to conduct the dog sniff since the initial traffic stop was lawful, and (2) the dog sniff did not unreasonably prolong the detention. State v. Brimmer, 187 N.C. App. 451, 653 S.E.2d 196, 2007 N.C. App. LEXIS 2420 (2007).

**Sobriety Checkpoint.** — Order suppressing evidence obtained by roadway checkpoint was error because no evidence suggested that the stated proper purpose of checkpoint (sobriety) was a mask for another, unconstitutional purpose, and as such the trial court was in error in holding that the lack of such evidence required it to exclude the evidence obtained by the stop; from the available evidence, it was clear that the actual purpose of the checkpoint was the same as its stated purpose: to check for sobriety. State v. Burroughs, 185 N.C. App. 496, 648 S.E.2d 561, 2007 N.C. App. LEXIS 1811 (2007).

**Traffic Stop for Violation of Windshield Tinting Restrictions.** — A deputy had reasonable suspicion to stop a car for violating windshield tinting restrictions, even though the tinting did not violate Florida law where the car was registered and despite the fact that the deputy misunderstood the applicable statutes, since the section did not except vehicles registered in other states, and the tinting did violate G.S. 20-127. State v. Schiffer, 132 N.C. App. 22, 510 S.E.2d 165 (1999).

**Informant's tip was sufficiently reliable to justify an investigative stop** of the vehicle in which defendant was a passenger, as well as a brief investigative detention of the vehicle's occupants, to search for weapons. State v. Sanchez, 147 N.C. App. 619, 556 S.E.2d 602, 2001 N.C. App. LEXIS 1238 (2001), cert. denied, 355 N.C. 220, 560 S.E.2d 358 (2002).

**Car Found in Plain View.** — Car reasonably believed to be the fruit, instrumentality or evidence of a crime can be seized whenever found in plain view. State v. Mitchell, 300 N.C. 305, 266 S.E.2d 605 (1980), cert. denied, 449 U.S. 1085, 101 S. Ct. 873, 66 L. Ed. 2d 810 (1981).

**Suspicion of Impairment Held Reasonable.** — Despite lack of an observed and verifiable traffic code violation by suspect, his driving 20 miles per hour below the speed limit and weaving within his lane were actions sufficient to raise a suspicion of an impaired driver in a reasonable and experienced trooper's mind. State v. Jones, 96 N.C. App. 389, 386 S.E.2d 217 (1989), appeal dismissed, 326 N.C. 366, 389 S.E.2d 809 (1990).

Defendant's contention that the trial court should not have denied defendant's motion to suppress because the officer who stopped defendant's two-wheeled motorized vehicle did not have probable cause to make the stop had to be rejected; the officer was only required to have reasonable suspicion to stop defendant's vehicle because the officer did not stop defendant's vehicle based on the traffic violation of operating an unregistered vehicle, which would have required probable cause, but, instead, stopped the vehicle after observing defendant operate the vehicle in a manner that allowed the officer to reach the reasonable conclusion that defendant was driving the vehicle while defendant was impaired. State v. Jones, 186 N.C. App. 405, 651 S.E.2d 589, 2007 N.C. App. LEXIS 2200 (2007).

Investigatory stop of defendant's vehicle at around 12:15 a.m. in a high crime area of a town where a number of bars were located was constitutional under U.S. Const., Amend. IV and N.C. Const., Art. I, § 20 because, under the totality of the circumstances, defendant's 30-second delay before proceeding through a green traffic light gave rise to a reasonable, articulable suspicion that defendant may have been driving while impaired. State v. Barnard, 362 N.C. 244, 658 S.E.2d 643, 2008 N.C. LEXIS 338 (2008).

**Blood Test on Unconscious Defendant.** — In a prosecution for involuntary manslaughter and driving under the influence, the performance of a blood alcohol test on blood seized from an unconscious defendant pursuant to G.S. 20-16.2(b) did not violate defendant's rights under the U.S. Constitution and this section, because of (1) the existence of probable cause to arrest; (2) the limited nature of the intrusion upon the person; and (3) the destructibility of the evidence. State v. Hollingsworth, 77 N.C. App. 36, 334 S.E.2d 463 (1985).

**Drug and Alcohol Testing.** — Trial court erred in granting a county board of education summary judgment in an action filed by a teacher, the North Carolina Association of Educators, support personnel, and administrators, seeking a declaration that the board's new drug and alcohol testing policy violated N.C. Const., Art. I, § 20 because the board's policy violated the guarantee against unreasonable searches, and board employees' acknowledged privacy interests outweighed the board's interest in conducting random, suspicionless testing; the policy did not specify the "bodily specimen" employees were required to produce, the employees did not have a reduced expectation of privacy by virtue of their employment in a public school system, and the record was devoid of any evidence that the board's prior policy was in any way insufficient to satisfy its needs. Jones v. Graham County Bd. of Educ., — N.C. App. —, 677 S.E.2d 171, 2009 N.C. App. LEXIS 695 (2009).

**Hair and Saliva Samples.** — Taking of hair and saliva samples without a showing of probable cause does not abridge the North Carolina Constitution. State v. Pearson, 145 N.C. App. 506, 551 S.E.2d 471, 2001 N.C. App. LEXIS 733 (2001), appeal dismissed, 354 N.C. 369, 557 S.E.2d 532 (2001), aff'd, 356 N.C. 22, 566 S.E.2d 50 (2002).

**Reasonable suspicion for weapons search.** — Officer had reasonable suspicion to briefly search defendant for weapons during a traffic stop and the denial of defendant's motion to suppress was proper because the officer used his prior experience and training to infer that the contents of defendant's right hand may have been a weapon and this inference went beyond unparticularized suspicion or hunch; because officers were allowed to take necessary steps to ensure their safety, the officer acted reasonably when he asked to see what was in defendant's hand. Moreover, the officer was led to a reasonable suspicion because of defendant's (1) erratic answers, (2) evasive actions, (3) continued refusal to show the officer the contents of his right fist, and (4) choice to raise his fist in a manner which led the officer to believe that defendant was about to strike him. State v. Miller, — N.C. App. —, 678 S.E.2d 802, 2009 N.C. App. LEXIS 1108 (July 7, 2009).

**Limitations on Pat-Down Search.** — Although a police officer was justified in conducting a limited pat-down of the defendant to determine whether the defendant was armed, once the officer concluded that there was no weapon, he could not continue to search or question the defendant in order to ascertain whether a rolled up plastic bag was contraband. State v. Beveridge, 112 N.C. App. 688, 436 S.E.2d 912 (1993), cert. denied, 335 N.C. 560, 441 S.E.2d 105, aff'd per curiam, 336 N.C. 601, 444 S.E.2d 223 (1994).

**Validity of Search Where Driver Not Charged with Offense.** — Fact that driver was not charged thereafter with a DUI offense was not relevant to the trooper's initial suspicions; therefore, stop and search of car was valid. State v. Jones, 96 N.C. App. 389, 386 S.E.2d 217 (1989), appeal dismissed, 326 N.C. 366, 389 S.E.2d 809 (1990).

**Results Not Suppressed Though State Line Crossed.** — Neither the federal nor State Constitutions required that evidence of patrolman's detection of alcohol on defendant's breath and the results of a breathalyzer test given him by a Surry County deputy sheriff be suppressed where the arresting officer did not know that defendant crossed the state line into Virginia before stopping his truck. State v. Gwyn, 103 N.C. App. 369, 406 S.E.2d 145, cert. denied, 330 N.C. 199, 410 S.E.2d 498 (1991).

**No Legitimate Expectation of Privacy in Communal Dumpster.** — Because communal dumpster was not within the curtilage of defendant, he retained no legitimate expectation of privacy in his garbage once he placed it in said dumpster, and the warrantless search of the dumpster, resulting in charges of trafficking in cocaine, did not violate this section. State v. Washington, 134 N.C. App. 479, 518 S.E.2d 14 (1999).

**No Legitimate Expectation of Privacy in Conversation with Confederate.** — Pre-arrest warrantless recording of defendant's incriminating statements through witness did not violate defendant's right to be free of unreasonable search and seizure under this section, inasmuch as defendant had no legitimate expectation of privacy regarding a conversation he voluntarily maintained with a confederate, did not violate defendant's right under N.C. Const., Art. I, § 23, to be free from compulsory self-incrimination because his participation in the conversation was wholly voluntary, albeit ill-advised, and did not violate defendant's right under N.C. Const., Art. I, § 23, to counsel because the conversation in question occurred during the initial investigation of defendant prior to his arrest. State v. Levan, 326 N.C. 155, 388 S.E.2d 429 (1990).

**Defendant did not have reasonable expectation of privacy within his jail cell** and search during which a letter defendant had written to his brother, asking the brother to commit perjury at his trial, was seized was proper. State v. Martin, 322 N.C. 229, 367 S.E.2d 618 (1988).

**Warrantless Strip Search Proper.** — Because a reasonable person would have understood from the circumstances and exchanges between the officers and defendant that police intended to conduct a strip search of defendant's person, and she consented to the strip search without withdrawing that consent at any time, the trial court properly denied her motion to suppress the evidence seized. State v. Neal, 190 N.C. App. 453, 660 S.E.2d 586, 2008 N.C. App. LEXIS 835 (2008).

**Warrantless Search Upheld.** — When officers saw liquid in containers generally used to contain and transport non-taxpaid liquor, under the circumstances then existing they had sufficient reasonable cause to believe that the jars contained non-taxpaid liquor to justify the seizure of the contraband without a search warrant. State v. Simmons, 278 N.C. 468, 180 S.E.2d 97 (1971).

Supreme Court of North Carolina held that both the trial court and the Court of Appeals erred in suppressing evidence seized during a warrantless search of defendant's automobile some 20 hours after an officer, who knew defendant and was familiar with her vehicle, received information that the automobile contained several one-fourth ounce packages of marijuana; the search was not illegal, and the evidence seized should not have been suppressed. State v. Isleib, 319 N.C. 634, 356 S.E.2d 573 (1987).

Trial court did not err in denying defendant's motion to suppress evidence of alleged contraband that was seized from defendant, as the police officer's observance very early one morning of defendant's vehicle parked on the shoulder of a road near a mobile home park into which another man had just fled gave the officer reasonable suspicion and justified the investigatory stop and detention of defendant; in addition, defendant's actions in "digging" through his glove compartment and searching around the interior of the vehicle made the officer's subsequent pat-down search of defendant permissible, at which time the officer discovered the alleged contraband defendant was carrying. State v. Martinez, 158 N.C. App.

105, 580 S.E.2d 54, 2003 N.C. App. LEXIS 927 (2003), cert. denied, 357 N.C. 466, 586 S.E.2d 773 (2003).

It was not unreasonable for authorities to strip defendant and comb through his pubic without search warrant after arresting him for first degree sexual assault, kidnapping and sodomy. Arrest was supported by probable cause and evidence could easily have been concealed or destroyed. State v. Norman, 100 N.C. App. 660, 397 S.E.2d 647 (1990).

Where the search involved a motor vehicle in a public area, the only determination left for review was whether deputy had probable cause to search the van; the trial court found as facts that deputy was sufficiently experienced to make a reliable determination that what he smelled was illegal contraband (white liquor), defendant appeared to deputy to be very nervous, and defendant had placed cardboard over a burned-out window on the van after a tire had caught fire; therefore deputy had reasonable grounds to conclude that the van contained contraband, and that he did not need a warrant to search. State v. Corpening, 109 N.C. App. 586, 427 S.E.2d 892 (1993).

There was reasonable suspicion to justify officer's search of defendant based on a telephone tip and the officer's observations of defendant. In re Whitley, 122 N.C. App. 290, 468 S.E.2d 610 (1996).

Where the incriminating evidence seized was immediately apparent to the officer, the cocaine was properly seized and admitted into evidence. In re Whitley, 122 N.C. App. 290, 468 S.E.2d 610 (1996).

The defendant's motion to suppress was properly denied where the detectives' prior knowledge of local drug activity, coupled with their 1:00 a.m. observations at the address as well as the circumstances surrounding defendant's actions, provided a sufficient basis for those experienced law enforcement officers to draw a reasonable inference "that criminal activity was afoot," id., thus warranting the investigative stop. State v. Parker, 137 N.C. App. 590, 530 S.E.2d 297 (2000).

Where defendant's arrest was lawfully based on the fruits of a valid pat down search, the warrantless search of his person incident to the arrest, which yielded marijuana and crack cocaine, was likewise constitutional; the initial check point stop and the driver's consent to the search of his vehicle provided sufficient constitutional justification for defendant's removal from the car, and the following facts supported the constitutionality of the pat down search: The long, narrow bulge in defendant's front pants pocket, his belligerent attitude toward the detectives, his apparent intoxication, and the driver's claim that he did not know defendant's name. State v. Pulliam, 139 N.C. App. 437, 533 S.E.2d 280, 2000 N.C. App. LEXIS 908 (2000).

Trial court properly concluded that a warrantless search conducted after a police officer and a detective entered a hotel room was not illegal where the detective had received information that the occupants of the room possessed drugs, the detective detected and observed behavior by the room's occupants indicative of drug-related criminal activity, and scales similar to those often used by dealers to measure quantities of illegal narcotics were in plain view. State v. Harper, 158 N.C. App. 595, 582 S.E.2d 62 (2003), cert. denied, 357 N.C. 509, 588 S.E.2d 372 (2003).

Trial court properly denied defendant's motion to suppress drugs obtained during a warrantless search of his car, as the drugs were found during a search incident to a lawful arrest supported by probable cause after verification of an informant's tip as to the vehicle, the perpetrator, and the location and approximate time of the alleged drug activity. State v. Collins, 160 N.C. App. 310, 585 S.E.2d 481 (2003), aff'd, 358 N.C. 135, 591 S.E.2d 518 (2004).

Evidence obtained in a warrantless search of defendant's vehicle was admissible where the officer had a reasonable, articulable suspicion to believe that defendant was committing an implied consent offense based on the facts that defendant's car was weaving combined with the unusual hour and the location, in an area near bars, and the search of defendant's car was lawful based on the fact that it was admittedly consensual and not tainted by an unlawful detention. State v. Jacobs, 162 N.C. App. 251, 590 S.E.2d 437, 2004 N.C. App. LEXIS 119 (2004).

Where defendant was suspected of committing two sexual assaults and a third was reported in the area from which defendant was observed traveling at about 4:00 a.m., when it was snowing and no other vehicles were on the road, police had reasonable suspicion of criminal activity allowing them to conduct an investigatory stop of defendant's vehicle, and defendant's expired license plate independently allowed the stop. State v. Edwards, 164 N.C. App. 130, 595 S.E.2d 213, 2004 N.C. App. LEXIS 728 (2004), cert. denied, 358 N.C. 735, 603 S.E.2d 879 (2004).

Defendant's motion to suppress tangible evidence obtained when an officer chased him into a premises was properly denied because defendant's earlier presence in and accessibility to the premises was insufficient to establish the requisite privacy interest for the Fourth Amendment. State v. McNeil, 165 N.C. App. 777, 600 S.E.2d 31 (2004).

Investigatory stop supported by evidence that defendant and another were observed loitering at a closed shopping center shortly before midnight wearing dark clothing in an area targeted by law enforcement officers as a high crime area, that no other vehicles were in the shopping center parking lot, and that when a vehicle defendant recognized as a law enforcement vehicle appeared, the men abruptly and hurriedly returned to their vehicle, together with the other detailed findings of fact articulated by the trial court, which adequately supported the officers' reasonable belief that defendant and the other man were involved in criminal activity. State v. Blackstock, 165 N.C. App. 50, 598 S.E.2d 412, 2004 N.C. App. LEXIS 1168 (2004), cert. denied, — N.C. —, 610 S.E.2d 208 (2005), appeal dismissed, cert. denied, — N.C. —, 610 S.E.2d 208 (2005).

Defendant's conviction for second-degree murder was upheld on appeal, because defendant failed to show any prejudice with regard to the trial court's admission of a gun residue test over defendant's objection, because defendant did not object to the admission of any statements made during the test, only the test results itself, and the trial court's finding that exigent circumstances existed was supported by the evidence in that the test had to have been administered within a few hours of the shooting and defendant admitted he was one of the last to have seen the victim alive. State v. Page, 169 N.C. App. 127, 609 S.E.2d 432, 2005 N.C. App. LEXIS 514 (2005).

Police had reasonable suspicion that defendant was transporting drugs, and their warrantless stop of defendant's van was proper, where a confidential informant told police that defendant would be transporting drugs and defendant was seen by police driving the van described by the informant along the suspected drug route; after the stop, defendant's consent for an officer to enter the van and the odor of cocaine smelled by the officer inside the van justified the officers' warrantless search of the van. State v. Downing, 169 N.C. App. 790, 613 S.E.2d 35, 2005 N.C. App. LEXIS 801 (2005).

Evidence that defendant was extremely nervous and refused to make eye contact, that an air freshener smell came from the vehicle, that the vehicle was not registered to the occupants, and that there was a disagreement between defendant and the passenger about the trip, provided law enforcement with the reasonable suspicion necessary to conduct the exterior canine sniff. State v. Euceda-Valle, 182 N.C. App. 268, 641 S.E.2d 858, 2007 N.C. App. LEXIS 584 (2007), cert. denied, appeal dismissed, 361 N.C. 698, 652 S.E.2d 923 (2007), State v. Euceda-Valle, 182 N.C. App. 268, 641 S.E.2d 858, 2007 N.C. App. LEXIS 584 (2007).

Where an officer observed defendant drive over a curb, back away from the officer, and reach into a pocket in a location known for drug activity, defendant's motion to suppress was properly denied because the officer had reasonable suspicion to make an investigatory stop and had probable cause to seize a film canister from defendant's pocket during a pat-down for weapons based on, inter alia, defendant's actions, the area's reputation, and the officer's prior experiences. State v. Robinson, 189 N.C. App. 454, 658 S.E.2d 501, 2008 N.C. App. LEXIS 648 (2008).

**Warrantless Search Held Improper.** — Following defendant's guilty plea to felony possession of cocaine and misdemeanor possession of drug paraphernalia under a plea agreement in which defendant preserved his right to appeal the denial of his motion to suppress pursuant to G.S. 15A-979(b), the appellate court affirmed the denial of the suppression motion; pursuant to N.C. Const., Art. I, § 20, a police officer had probable cause to stop defendant's vehicle based on the officer's observation of defendant speeding, and under the totality of the circumstances, including defendant's extreme nervousness, the officer had reasonable grounds to frisk defendant. State v. McRae, 154 N.C. App. 624, 573 S.E.2d 214, 2002 N.C. App. LEXIS 1523 (2002).

Policeman's action in entering the back porch and looking through defendant's window was an unlawful search under the Fourth Amendment of the United States Constitution and Art. I, § 20 of the North Carolina Constitution; thus, the items seized in a subsequent search of the apartment were tainted by the unlawful search. State v. Wooding, 117 N.C. App. 109, 449 S.E.2d 760 (1994).

Due to the paucity of the evidence presented by the State, the appellate court agreed with the defendant that crack cocaine and drug paraphernalia seized by a police officer at the hospital while he was visiting and interviewing the wounded defendant should have been suppressed, because the warrantless seizure and search of wads of brown paper uncovered as nurse undressed defendant was unconstitutional. State v. Graves, 135 N.C. App. 216, 519 S.E.2d 770 (1999).

Although an officer's stop of a vehicle in which defendant was a passenger was supported by reasonable suspicion based on the officer's observation of the vehicle speeding, the officer's search of defendant's person exceeded the scope of defendant's consent; after defendant gave the officer consent to search his person, the officer pulled defendant's sweat pants away from defendant's body and trained his flashlight on defendant's groin area, where he saw the top of a pill bottle. State v. Stone, 179 N.C. App. 297, 634 S.E.2d 244, 2006 N.C. App. LEXIS 1922 (2006).

Officer lacked reasonable articulable suspicion of criminal activity to support the stop and frisk of defendant under Terry; the report that the officer received only indicated that a black male had committed armed robbery, a description that fit a substantial percentage of the population, and there was no further description as to age, physical characteristics, or clothing. State v. Cooper, 186 N.C. App. 100, 649 S.E.2d 664, 2007 N.C. App. LEXIS 1984 (2007).

Officer unreasonably detained the defendant after completing a traffic stop of the defendant's cousin, the driver of the car defendant was riding in, because the cousin's nervousness, in the context of the circumstances, did not rise to the level of reasonable suspicion necessary to justify further detention; among other things, the officer did not detect alcohol and found no contraband or weapons, and the fact that the rental car the defendant had rented was one day overdue did not raise the officer's suspicions. State v. Myles, 188 N.C. App. 42, 654 S.E.2d 752, 2008 N.C. App. LEXIS 100 (2008).

Defendant was entitled to the suppression of evidence obtained from an investigatory stop and subsequent searches of defendant's jacket and car because the police officer who stopped defendant could supply no facts to support a reasonable suspicion that a crime was afoot when he stopped defendant; moreover, defendant's resistance and flight and flight from the officer was not be used as retroactive justification for the stop. State v. Hayes, 188 N.C. App. 313, 655 S.E.2d 726, 2008 N.C. App. LEXIS 84 (2008).

Trial court erred by denying defendant's motion to suppress the drug and weapon contraband found in his hotel room as his Fourth Amendment rights were violated as a result of the police accompanying a hotel manager into his room and discovering the contraband when no exigent circumstances existed nor did defendant consent to the entry by the police. State v. McBennett, 191 N.C. App. 734, 664 S.E.2d 51, 2008 N.C. App. LEXIS 1486 (2008).

**Voluntary Consent.** — Where defendant gave trooper permission to search the entire contents of defendant's suitcase and did not retract or limit the consent, the trooper had defendant's consent to open package of cocaine contained therein, and the trial court did not err in allowing the contents of the package into evidence at trial. State v. Jones, 96 N.C. App. 389, 386 S.E.2d 217 (1989), appeal dismissed, 326 N.C. 366, 389 S.E.2d 809 (1990).

In appeal from conviction for trafficking based upon drugs found in defendant's car after trooper had stopped car on suspicion that the driver was impaired, fact that trooper's conversation with defendant about driver's identity resulted in defendant giving his voluntary consent to a search of the car did not support defendant's arguments that trooper exceeded the permissible scope of his investigation. State v. Jones, 96 N.C. App. 389, 386 S.E.2d 217 (1989), appeal dismissed, 326 N.C. 366, 389 S.E.2d 809 (1990).

Where defendant gave consent to the search of defendant's vehicle while defendant was seated in the patrol car with the officer who was writing defendant's traffic citation, the consent was validly given pursuant to G.S. 15A-222, N.C. Const., Art. I, § 20, and U.S. Const., Amend. IV; the officer read a consent form to defendant which defendant signed, and defendant stated that defendant believed defendant was free to leave after the citation was issued. State v. Hernandez, 170 N.C. App. 299, 612 S.E.2d 420, 2005 N.C. App. LEXIS 1006 (2005).

Girlfriend's consent to search defendant's residence was voluntary where there was no evidence that defendant's girlfriend, who was in the hospital with shoulder pain at the time she gave consent, was not in possession of her mental faculties at the time consent was given. State v. Watson, 179 N.C. App. 228, 634 S.E.2d 231, 2006 N.C. App. LEXIS 1923 (2006).

Defendant's right against an unconstitutional search and seizure was not violated when the officers searched defendant's shop as: (1) defendant's girlfriend, who had lived with him for 13 years, consented to the search; (2) the shop was located within the curtilage of the house; (3) the officers had no reason to question the girlfriend's authority to consent to a search of the shop; and (4) the girlfriend's consent was voluntary. State v. Watkins, 181 N.C. App. 502, 640 S.E.2d 409, 2007 N.C. App. LEXIS 360 (2007).

Because Miranda warnings were not required before defendant consented to a search of a vehicle, and because any error in admitting the fruits of the search was harmless, the trial court properly denied defendant's motion to suppress. State v. Cummings, 188 N.C. App. 598, 656 S.E.2d 329, 2008 N.C. App. LEXIS 198 (2008).

## III. SEARCH WARRANTS.

**What Warrants Are Prohibited.** — The general warrants against which this constitutional provision speaks did not specify items to be searched for or persons to be arrested, nor were they supported by showings of probable cause that any particular crime had been committed. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

This section proscribes warrants that empower officials to search for evidence of a particular offense without specifically naming the person against whom the offense is charged, the particular place to be searched or the items to be seized. Brooks v. Taylor Tobacco Enters., Inc., 39 N.C. App. 529, 251 S.E.2d 656, rev'd on other grounds, 298 N.C. 759, 260 S.E.2d 419 (1979).

Judicial warrants, general in terms and unsupported by preliminary oath or sworn evidence and for conduct not committed in the immediate presence of the magistrate, are forbidden by the federal Constitution and by this section. Brewer v. Wynne, 163 N.C. 319, 79 S.E. 629, 1915B Ann. Cas. 319 (1913).

**Anticipatory Warrant.** — Three requirements that must be observed before a search is executed pursuant to an anticipatory search warrant: (1) the anticipatory warrant must set out, on its face, explicit, clear, and narrowly drawn triggering events which must occur before execution may take place; (2) those triggering events, from which probable cause arises, must be (a) ascertainable, and (b) preordained, meaning that the property is on a sure and irreversible course to its destination; and finally, (3) no search may occur unless and until the property does, in fact, arrive at that destination. State v. Baldwin, 161 N.C. App. 382, 588 S.E.2d 497 (2003).

An anticipatory warrant to search the premises when an intercepted package containing contraband was delivered was properly executed where: (1) the warrant clearly established explicit triggering events on its face which were definable and preordained; (2) although the package was no longer in the house when the search occurred, the package was delivered, accepted, and taken into the house by defendant; (3) the delivery of the package linked the house to criminal activity inside, giving rise to probable cause for the search; and (4) the warrant specifically allowed the officers to search the premises to find and seize cocaine generally and to identify the participants of the crime; thus, a trial court correctly denied defendant's motion to suppress evidence seized pursuant to the anticipatory search warrant. State v. Baldwin, 161 N.C. App. 382, 588 S.E.2d 497 (2003).

Anticipatory search warrant sufficiently incorporated by reference the attached affidavit, which clearly identified the triggering events required to execute the warrant, and the two documents could be read together to provide the specificity and particularity required under the U.S. Const., Amend. IV, N.C. Const., Art. I, § 20, and G.S. 15A-246. State v. Carrillo, 164 N.C. App. 204, 595 S.E.2d 219, 2004 N.C. App. LEXIS 707 (2004).

Anticipatory search warrant, which provided that authority for the search contained in the warrant was not commenced until a confidential informant gave a prearranged signal that marijuana was seen at a residence, was valid because (1) the affidavit supporting the warrant was reliable and the information before a trial court was obtained in a reliable manner because the police were able to independently confirm a number of statements the informant made, and the trial court had information before it as to the informant's year-long history of purchasing drugs from defendant, as well as police officers' testimony that they considered the information reliable; (2) the warrant contained clear triggering events; (3) the triggering events were ascertainable and preordained; and (4) no search could have taken place until after those triggering events occurred. State v. Stallings, 189 N.C. App. 376, 657 S.E.2d 915, 2008 N.C. App. LEXIS 531 (2008), appeal dismissed, review denied, 362 N.C. 370, 663 S.E.2d 859 (2008).

**Totality of Circumstances Test Adopted.** — For resolving questions arising under this section with regard to the sufficiency of probable cause to support the issuance of a search warrant, the Supreme Court of North Carolina adopts the totality of circumstances test of Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) and Massachusetts v. Upton, 466 U.S. 727, 104 S. Ct. 2085, 80 L. Ed. 2d 721 (1984) and rejects the two-pronged test of Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964) and Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969). State v. Arrington, 311 N.C. 633, 319 S.E.2d 254 (1984).

Under the totality of circumstances test, the two prongs of *Aguilar* and *Spinelli* — veracity and basis of knowledge — are still relevant, but are not to be accorded independent status. The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. State v. Arrington, 311 N.C. 633, 319 S.E.2d 254 (1984).

The North Carolina Supreme Court has adopted the "totality of the circumstances" test to determine the sufficiency of probable cause to issue a warrant under this section. State v. Isleib, 80 N.C. App. 599, 343 S.E.2d 234 (1986), rev'd on other grounds, 319 N.C. 634, 356 S.E.2d 573 (1987).

**Proper Warrant Required.** — Ordinarily even the strong arm of the law may not invade one's dwelling except under authority of a proper search warrant. In re Walters, 229 N.C. 111, 47 S.E.2d 709 (1948); State v. Robbins, 275 N.C. 537, 169 S.E.2d 858 (1969).

An arrest without warrant, except as authorized by statute, is illegal. State v. Moore, 275 N.C. 141, 166 S.E.2d 53 (1969).

**After-the-Fact Scrutiny of Affidavit Should Not Be De Novo Review.** — After-the-fact scrutiny by courts of the sufficiency of an affidavit in support of a warrant should not take the form of de novo review. State v. Tuggle, 99 N.C. App. 164, 392 S.E.2d 654 (1990).

**A warrant must sufficiently identify the person accused.** Carson v. Doggett, 231 N.C.

629, 58 S.E.2d 609 (1950).

**Particular Description of Things to Be Seized Required.** — The requirement that warrants shall particularly describe the things to be seized is to prevent the seizure of one thing under a warrant describing another and to leave nothing to the discretion of the officer executing the warrant in determining what is to be taken. State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

**Description of Books.** — The particularity requirement is to be accorded the most scrupulous exactitude when the things to be seized are books and the basis for the seizure is the ideas which they contain. When First Amendment rights are not involved, the specificity requirement is more flexible. State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

**Description of Narcotics.** — The words "illegally held narcotic drugs" described the things to be seized with sufficient particularity to prevent the warrant from being a general search warrant within the prohibition of U.S. Const., Amend. IV and this section. State v. Shirley, 12 N.C. App. 440, 183 S.E.2d 880, cert. denied, 279 N.C. 729, 184 S.E.2d 885 (1971).

The description in the search warrant was particular enough to prevent the warrant from being a general search warrant within the prohibition of U.S. Const., Amend. IV and this section where the affidavit upon which it was based referred only to "narcotic drugs, the possession of which is a crime" and did not describe the things to be seized with more particularity. State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

**Incorporation of Affidavit.** — Where an affidavit complied with the provisions of the applicable statute and met the constitutional standard of reasonableness and probable cause requisite to the issuance of a search warrant, the search warrant, by reference to the affidavit, which was made a part of the warrant, described with reasonable certainty the premises to be searched, sufficiently indicated the basis for the finding of probable cause, and sufficiently described the contraband for which the search was to be conducted. State v. Murphy, 15 N.C. App. 420, 190 S.E.2d 361 (1972).

**Affidavit Sufficient to Find Probable Cause.** — Affidavit stating that a confidential informant (CI) bought cocaine from defendant at defendant's house, that the officer knew and trusted the CI, that the CI made a controlled buy from defendant after meeting with the officer, and that the officer witnessed several hand-to-hand transactions between defendant and visitors to defendant's house, provided probable cause to support the issuance of the search warrant. State v. Stokley, 184 N.C. App. 336, 646 S.E.2d 640, 2007 N.C. App. LEXIS 1464 (2007).

Police officer's affidavit, based on information from an informant the officer had known for years, was sufficient for the issuance of a search warrant under G.S. 15A-244 because under the totality of the circumstances the affidavit provided a magistrate with probable cause for the issuance of a search warrant for defendant's home under U.S. Const., Amend. IV and N.C. Const., Art. I, § 20. State v. Edwards, 185 N.C. App. 701, 649 S.E.2d 646, 2007 N.C. App. LEXIS 1947 (2007).

**Production of Search Warrant.** — Where a search is made under conditions requiring the issuance of a search warrant, and the State attempts, over objection, to justify the search and seizure by the possession of a valid search warrant, the State must produce the search warrant, or if it has been lost, must prove such fact and then introduce evidence to show its contents and regularity on its face, unless the production of the warrant is waived by the accused. State v. McMilliam, 243 N.C. 771, 92 S.E.2d 202 (1956).

**Severable Provisions.** — Provisions of warrant which authorized police to search both for drugs and for "stolen goods" were severable, and the police could constitutionally search for the listed drugs or items of the same class, but the warrant could not authorize a general exploratory search of defendant's home and inventory of its contents. State v. Connard, 81 N.C. App. 327, 344 S.E.2d 568 (1986), aff'd, 319 N.C. 392, 354 S.E.2d 238 (1987).

**Withdrawal of a blood sample from a person is a search subject to protection by this section.** State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988).

**Under the State Constitution, a search warrant must be issued before a blood sample can be obtained,** unless probable cause and exigent circumstances exist that would justify a warrantless search. State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988).

**Blood Sample Taken Without Consent or Search Warrant Unconstitutional.** — Where defendant was already in custody, obtaining a sample of his blood pursuant to a nontestimonial identification order under Article 14 of Chapter 15A (G.S. 15A-271, et seq.), absent his consent or a search warrant, violated his rights under this section to be free from unreasonable searches and seizures, and the evidence should have been suppressed. State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988).

**Cumulative Evidence Held to Support Determination.** — Although no single piece of evidence in the affidavit was conclusive, nevertheless, the information from all three pieces was consistent, and their cumulative evidence supported the determination that there was a "fair probability that contraband or evidence of a crime" would be found at the defendant's residence. State v. Tuggle, 99 N.C. App. 164, 392 S.E.2d 654 (1990).

**Affidavit Insufficient to Find Probable Cause.** — Where the affidavit contained a mere naked assertion that the informant at some time saw a "room full of marijuana" growing in the defendant's house, and the officer affiant made no attempt to corroborate the informant's story, but merely verified that the defendant lived in the house in question, the affidavit did not contain sufficient information on which to find probable cause, nor could the evidence seized as a result of the search be admitted under the "good faith exception" to the exclusionary rule in view of the fact that the officer took no reasonable steps to comply with U.S. Const., Amend. IV. State v. Newcomb, 84 N.C. App. 92, 351 S.E.2d 565 (1987).

Evidence seized pursuant to a search warrant was properly suppressed because, inter alia, the affidavit supporting the search warrant merely stated that the confidential informant had visited the described location and made controlled purchases of cocaine at the location, without particularly stating which, if any, of the two dwellings the informant entered to make the purchases. In addition, the special agent had only been working in law enforcement for two years at the time the agent applied for the search warrant, and failed to include facts regarding whether the agent observed the transactions between the confidential informant and the seller, thereby failing to establish the identity of the seller as defendant. State v. Taylor, 191 N.C. App. 587, 664 S.E.2d 421, 2008 N.C. App. LEXIS 1504 (2008).

**Defendant's Rights Not Violated.** — Where probable cause existed to support issuance of search warrant for defendant's hair, saliva, and blood pursuant to G.S. 15A-242(4), the State did not violate the defendant's rights, under N.C. Const., Art. I, § 20, by failing to obtain a nontestimonial identification order, pursuant to G.S. 15A-273, or to provide defendant with the right to counsel during the execution of the search warrant, under G.S. 15A-279(d). State v. Grooms, 353 N.C. 50, 540 S.E.2d 713, 2000 N.C. LEXIS 895 (2000), cert. denied, 534 U.S. 838, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001).

While defendant was an overnight guest in the premises searched pursuant to a search warrant, he did not show that he personally had an expectation of privacy there, or that such an expectation was reasonable; therefore, he had no standing to object to the search of the premises. State v. Sanchez, 147 N.C. App. 619, 556 S.E.2d 602, 2001 N.C. App. LEXIS 1238 (2001), cert. denied, 355 N.C. 220, 560 S.E.2d 358 (2002).

When, after a proper investigatory stop and protective search of defendant's vehicle, money, gloves and headgear from rapes and robberies he had committed were observed in plain view, a magistrate had probable cause to issue warrants to search defendant's home, business, vehicle, and person. State v. Edwards, 164 N.C. App. 130, 595 S.E.2d 213, 2004 N.C. App. LEXIS 728 (2004), cert. denied, 358 N.C. 735, 603 S.E.2d 879 (2004).

**Affidavit Sufficient to Support Finding of Probable Cause Despite Alleged False Statements Contained Therein.** — Affidavit containing allegedly false statements was not invalid where other statements supported finding of probable cause; among other things, the unchallenged statements showed that 20 different sources complained to police about criminal activity at the subject residence and a confidential informant made a controlled buy of cocaine at the residence. State v. Boyd, 177 N.C. App. 165, 628 S.E.2d 796, 2006 N.C. App. LEXIS 854 (2006).

**Stop of Vehicle After Defendant Turned Away Just Prior to Checkpoint.** — Denial of motion to suppress was upheld as totality of circumstances justified officer's pursuing and stopping defendant's vehicle to inquire as to why defendant turned away before checkpoint. In addition to the fact of defendant's legal turn immediately prior to the checkpoint, the following facts combined to allow the officer to make a reasonable inquiry to determine whether defendant was trying to evade the checkpoint: (1) the late hour; (2) the sudden braking of the truck when defendant crested the hill and could see the checkpoint, to the point that the headlights dipped as the front of the truck dove towards the street; (3) the abruptness of defendant's turn into the nearest apartment parking lot; and (4) defendant's behavior in first backing the truck into one space, pulling out and proceeding towards the parking lot exit, and then re-parking when he spotted the patrol car approaching him. State v. Bowden, 177 N.C. App. 718, 630 S.E.2d 208, 2006 N.C. App. LEXIS 1218 (2006).

## Sec. 21. Inquiry into restraints on liberty.

Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the restraint if unlawful, and that remedy shall not be denied or delayed. The privilege of the writ of habeas corpus shall not be suspended.

**Cross References.** — As to habeas corpus, see G.S. 17-1 et seq.

**History.** — The provisions of the first sentence of this section are similar to those of Art. I, § 18, Const. 1868, and the provisions of the second sentence of this section are similar to those of Art. I, § 21, Const. 1868.

**Legal Periodicals.** — For article surveying recent decisions by the North Carolina Supreme Court in the area of criminal procedure, see 49 N.C.L. Rev. 262 (1971).

CASE NOTES

**No Claim Exists under This Section Where a Different State Remedy Was Available.** — Summary judgment was proper in favor of the defendant city on each of plaintiff's state constitutional claims arising under this section and Art. I, §§ 19 to 21, 35, and 36, where the plaintiff bus driver had an adequate state tort remedy for her alleged injury resulting from the defendant police officer's conduct. Glenn-Robinson v. Acker, 140 N.C. App. 606, 538 S.E.2d 601, 2000 N.C. App. LEXIS 1258 (2000).

**Search and Seizure.** — Where an officer observed defendant drive over a curb, back away from the officer, and reach into a pocket in a location known for drug activity, defendant's motion to suppress was properly denied because the officer had reasonable suspicion to make an investigatory stop and had probable cause to seize a film canister from defendant's pocket during a pat-down for weapons based on, inter alia, defendant's actions, the area's reputation, and the officer's prior experiences. State v. Robinson, 189 N.C. App. 454, 658 S.E.2d 501, 2008 N.C. App. LEXIS 648 (2008).

**For discussion of the writ of habeas corpus,** see State v. Lewis, 274 N.C. 438, 164 S.E.2d 177 (1968), decided under Art. I, § 18, Const. 1868.

**Habeas Corpus Petition Denied.** — Prisoner's habeas corpus petition pursuant to N.C. Const. art. I, § 21, was denied; trial counsel did not provide ineffective assistance pursuant to N.C. Const. art. I, § 23 (2003), in relation to a plea bargain, as defendant's attorney considered a possible affirmative defense and properly determined that the defense was unlikely to succeed. Goode v. Warden, — A.2d —, 2003 Conn. Super. LEXIS 2687 (Conn. Super. Ct. Sept. 25, 2003).

**Statute Prescribing Inmate Grievance Procedures Upheld.** — Former section 148-113, requiring an inmate to exhaust his administrative remedies before he is entitled to judicial review of a grievance or complaint within the jurisdiction of the Inmate Grievance Commission, did not conflict with constitutional and statutory provisions guaranteeing the privilege of the writ of habeas corpus, since former G.S. 148-113 only prescribed the method by which the inquiry into the lawfulness of an inmate's detention is to be conducted. Hoffman v. Edwards, 48 N.C. App. 559, 269 S.E.2d 311 (1980).

**Restraint on Court's Power to Release Inmate Acquitted on Grounds of Insanity Not Valid.** — The power of the court to discharge a person acquitted of crime because of insanity upon habeas corpus cannot be made to depend solely upon certification by the superintendents of the several State hospitals that he is sane and safe. Such a condition deprives the court of any exercise of judicial discretion and nullifies its power to release an inmate being illegally detained in a mental hospital. In re Tew, 280 N.C. 612, 187 S.E.2d 13 (1972).

**Cited** in State v. Price, — N.C. App. —, 611 S.E.2d 891 (2005); State v. Gabriel, — N.C. App. —, 665 S.E.2d 581, 2008 N.C. App. LEXIS 1627 (2008); State v. Rouse, — N.C. App. —, 679 S.E.2d 520, 2009 N.C. App. LEXIS 1162 (July 21, 2009).

## Sec. 22. Modes of prosecution.

Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment. But any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases.

**Cross References.** — As to indictments and related instruments, see G.S. 15A-641 et seq.

**History.** — The provisions of this section are similar to those of Art. I, § 12, Const. 1868, as amended in 1950.

**Legal Periodicals.** — For note on jurisdiction of courts-martial to try servicemen for civilian offenses, see 48 N.C.L. Rev. 380 (1970).

For note examining the development of constitutional protections against race and class discrimination in the selection of jurors, and policy considerations associated with extending these principles to foreman selection procedures, in light of State v. Cofield, 77 N.C. App.

699, 336 S.E.2d 439 (1985), see 64 N.C.L. Rev. 1179 (1986).

## CASE NOTES

***Editor's Note.*** — *Some of the cases cited below were decided under former Art. I, § 12, Const. 1868, before and after its amendment in 1950.*

**For history of this section,** see State v. Thomas, 236 N.C. 454, 73 S.E.2d 283 (1952).

**The principles of this section are dear to every free man;** they are his shield and buckler against wrong and oppression, and lie at the foundation of civil liberty. They are declared to be the rights of the citizens of North Carolina and ought to be vigilantly guarded. State v. Moss, 47 N.C. 66 (1854); State v. Snipes, 185 N.C. 743, 117 S.E. 500 (1923).

**The purposes of this section** and N.C. Const., Art. I, § 23 are (1) to provide certainty so as to identify the offense, (2) to protect the accused from twice being put in jeopardy for the same offense, (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of guilty or nolo contendere, to pronounce sentence according to the rights of the case. State v. Stokes, 274 N.C. 409, 163 S.E.2d 770 (1968); State v. Foster, 10 N.C. App. 141, 177 S.E.2d 756 (1970).

**Process of indictment by grand jury pursuant to G.S. 15-144 adequately safeguards a defendant's rights under the Federal and North Carolina Constitutions.** State v. Seward, 362 N.C. 210, 657 S.E.2d 356, 2008 N.C. LEXIS 138 (2008).

**"Indictment".** — The word "indictment" means indictment by a grand jury as defined by the common law. State v. Mitchell, 202 N.C. 439, 163 S.E. 581 (1932).

The term "indictment" is used in this section to signify a written accusation of a crime drawn up by the public prosecuting attorney and submitted to the grand jury, and by them found and presented on oath or affirmation as a true bill. State v. Thomas, 236 N.C. 454, 73 S.E.2d 283 (1952).

**Use of Short-form Indictment.** — Court of appeals rejected defendant's argument that the trial court violated his rights under U.S. Const. amends. V, VI, and XIV and N.C. Const. art. I, §§ 19, 22, and 23 by entering a judgment convicting him of felony murder and sentencing him to life imprisonment without parole on the basis of a short-form indictment. State v. Coleman, 161 N.C. App. 224, 587 S.E.2d 889, 2003 N.C. App. LEXIS 2039 (2003).

Court of appeals rejected defendant's argument that the trial court violated his rights under U.S. Const. amends. V, VI, and XIV and N.C. Const. art. I, §§ 19, 22, and 23, by entering a judgment convicting him of first degree rape and first degree sex offense on the basis of a short-form indictment. State v. Randle, 167 N.C. App. 547, 605 S.E.2d 692, 2004 N.C. App. LEXIS 2381 (2004).

Short-form murder indictment is constitutional. State v. Alvarez, 168 N.C. App. 487, 608 S.E.2d 371, 2005 N.C. App. LEXIS 342 (2005).

**"Presentment".** — As to the meaning of the term "presentment," see State v. Thomas, 236 N.C. 454, 73 S.E.2d 283 (1952).

**It is an essential of jurisdiction that a criminal offense should be sufficiently charged** in a warrant or an indictment. State v. Stokes, 274 N.C. 409, 163 S.E.2d 770 (1968).

**A valid indictment is a condition precedent to jurisdiction** of the superior court to determine the guilt or innocence of a defendant and to the authority of the court to render a valid judgment in the matter. State v. Yoes, 271 N.C. 616, 157 S.E.2d 386 (1967); State v. Stokes, 274 N.C. 409, 163 S.E.2d 770 (1968); State v. Ray, 274 N.C. 556, 164 S.E.2d 457 (1968).

This section requires a bill of indictment, unless waived, for all criminal actions originating in the superior court, and a valid bill is necessary to vest the court with authority to determine the question of guilt or innocence. State v. Bissette, 250 N.C. 514, 108 S.E.2d 858 (1959).

A valid indictment is essential to the jurisdiction of the court in a criminal case. State v. Crabtree, 286 N.C. 541, 212 S.E.2d 103 (1975); State v. Johnson, 77 N.C. App. 583, 335 S.E.2d 770 (1985).

In a criminal prosecution where no presentment or impeachment is involved and no waiver of indictment has been made, a valid bill of indictment is essential to the jurisdiction of the court to try defendant for a felony. State v. Simpson, 302 N.C. 613, 276 S.E.2d 361 (1981).

Order denying defendant's motion to suppress evidence was void because the trial court was without jurisdiction to entertain and rule upon the motion as defendant had not been indicted or waived indictment at the time of the hearing. State v. Wolfe, 158 N.C. App. 539, 581 S.E.2d 117, 2003 N.C. App. LEXIS 1182 (2003).

Remand for re-sentencing on felony child abuse inflicting serious physical injury was improper because the indictment failed to allege an essential element required for proof of that crime: that injury be inflicted by a parent or any other person providing care to or supervision of a child less than 16 years of age; however, the indictment and jury verdict did support a conviction for class A1 misdemeanor assault. State v. Locklear, 178 N.C. App. 732, 632 S.E.2d 516, 2006 N.C. App. LEXIS 1641 (2006).

**One charged with a capital felony may only be prosecuted on an indictment** found by a grand jury. State v. Thomas, 236 N.C. 454, 73 S.E.2d 283 (1952).

**When Indictments Are Not Required.** — The constitutional requirement that criminal trials must be upon a bill of indictment is subject to two exceptions: (1) The legislature may provide means other than indictments by grand juries for the trial of petty misdemeanors; and (2) when represented by counsel, an accused may, in all except capital cases, waive indictment under rules prescribed by the legislature. State v. Stevens, 264 N.C. 364, 141 S.E.2d 521 (1965).

The provisions of this section and N.C. Const., Art. I, § 24, when read together, empower the legislature to provide means other than indictments by grand juries for the trial of petty misdemeanors, with the right of appeal. State v. Thomas, 236 N.C. 454, 73 S.E.2d 283 (1952); State v. Underwood, 244 N.C. 68, 92 S.E.2d 461 (1956).

**Indictment on Appeal to Superior Court.** — Until the legislature prescribes regulations governing waiver of an indictment in a case heard in superior court on an appeal from an inferior court, an accused in such a case may not waive indictment and be tried upon an information. State v. Harrington, 5 N.C. App. 622, 169 S.E.2d 32 (1969).

**When Trial on Appeal in Superior Court May Be upon Original Accusation.** — Where the General Assembly declares an offense below the grade of felony to be a petty misdemeanor and provides for prosecution of such offense in an inferior court upon accusation other than indictment, and confers upon such inferior court final jurisdiction of such prosecutions subject to the right of appeal to the superior court, the defendant on appeal from conviction in the inferior court may be tried in the superior court upon the original accusation without an indictment; but when there has been no trial in the inferior court, and the prosecution has merely been transferred to the superior court upon defendant's demand for jury trial, trial in the superior court upon the original warrant is a nullity, and a statute providing for such trial is unconstitutional. State v. Thomas, 236 N.C. 454, 73 S.E.2d 283 (1952).

A defendant convicted in a recorder's court having final jurisdiction of the offense charged could be tried in the superior court on appeal upon the original warrant without an indictment. State v. Doughtie, 238 N.C. 228, 77 S.E.2d 642 (1953).

The superior court has no jurisdiction to try an accused for a specific misdemeanor on the warrant of an inferior court unless he is first tried and convicted for such misdemeanor in the inferior court and appeals to the superior court from the sentence pronounced against him by the inferior court on his conviction for such misdemeanor. State v. Hall, 240 N.C. 109, 81 S.E.2d 189 (1954); State v. Morgan, 246 N.C. 596, 99 S.E.2d 764 (1957); State v. Cofield, 247 N.C. 185, 100 S.E.2d 355 (1957); State v. Guffey, 283 N.C. 94, 194 S.E.2d 827 (1973); State v. Caldwell, 21 N.C. App. 723, 205 S.E.2d 322 (1974).

**Waiver of Indictment in Non-Capital Cases.** — One charged with a noncapital felony or with a misdemeanor may be tried initially in the superior court only upon an indictment, except when he is represented by counsel he may be tried upon information signed by the prosecuting attorney when written waiver of indictment by defendant and his counsel appears on the face of the information. State v. Thomas, 236 N.C. 454, 73 S.E.2d 283 (1952).

A person charged with the commission of a misdemeanor cannot be tried initially in the superior court except upon an indictment found by a grand jury, unless he waives indictment in accordance with regulations prescribed by the legislature. State v. Norman, 237 N.C. 205, 74 S.E.2d 602 (1953).

By virtue of this section an accused in a criminal proceeding, when represented by counsel, may, in all except capital cases, waive indictment under rules prescribed by the legislature. State v. Harrington, 5 N.C. App. 622, 169 S.E.2d 32 (1969).

**An indictment must clearly and positively identify the person charged** with the commission of the offense; omission of the name of the defendant, or a sufficient description if his name is unknown, in the body of the indictment, is a fatal and incurable defect. State v. Simpson, 302 N.C. 613, 276 S.E.2d 361 (1981).

**All Essential Elements of Offense Must Be Charged.** — An indictment, whether at common law or under a statute, to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. State v. Stokes, 274 N.C. 409, 163 S.E.2d 770 (1968).

All of the essential elements of the offense must be alleged in an indictment charging a statutory offense. State v. Crabtree, 286 N.C. 541, 212 S.E.2d 103 (1975); State v. Johnson, 77 N.C. App. 583, 335 S.E.2d 770 (1985).

**Short Form Murder Indictment Lacking Elements of Premeditation and Deliberation Upheld.** — The court rejected the defendant's argument that because the indictment failed to allege two essential elements of first degree murder, i.e., premeditation and deliberation, his conviction of first degree murder based thereon violated Article I, §§ 19, 22 and 23 of the North Carolina Constitution. The court found that the defendant had adequate notice of the charge against him, as North Carolina has for nearly 100 years authorized the use of the short form murder indictment as sufficient to allege the elements of premeditation and deliberation, and the jury was properly required to find those elements beyond a reasonable doubt. State v. Holder, 138 N.C. App. 89, 530 S.E.2d 562, 2000 N.C. App. LEXIS 552 (2000).

**An indictment is constitutionally sufficient if it apprises defendant of the charge** against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense. The indictment must also enable the court to know what judgment to pronounce in case of conviction. State v. Lowe, 295 N.C. 596, 247 S.E.2d 878 (1978).

**If an indictment charges the offense in a plain, intelligible and explicit manner** and contains averments sufficient to enable the court to proceed to judgment, and to bar a subsequent prosecution for the same offense, it is sufficient. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

**Offenses Which Indictment Will Support.** — Where the indictment was insufficient to allege attempted first degree murder because the indictment on its face failed to include the essential element of malice aforethought, but the indictment was sufficient to allege voluntary manslaughter, the case could be remanded based on the jury's verdict for sentencing and entry of judgment for attempted voluntary manslaughter. State v. Bullock, — N.C. App. —, 566 S.E.2d 768, 2002 N.C. App. LEXIS 885 (2002).

**Use of Statutory Language.** — An indictment for a statutory offense is sufficient as a general rule when it charges the offense in the language of the statute. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

**Aggravating Circumstances for the Death Penalty.** — Heinous, atrocious, or cruel aggravating circumstance under G.S. 15A-2000(e)(9) was argued to be unconstitutionally vague and overbroad, and that that vagueness could not be cured through appellate narrowing after Ring; although the issue was not raised in the lower court so as to be properly addressed on appeal, the highest court found the issue to be in the public interest, addressed the issue to further develop its jurisprudence under N.C. R. App. P. 2, and determined that the circumstance was constitutional under the Sixth Amendment because (1) the pattern jury instructions included language approved by the Court that narrowed the definition of the circumstance, and (2) the appellate review of the circumstance as submitted to the jury did not make the appellate court a "co-finder of fact" with the jury. State v. Duke, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

**Aggravating Circumstances of Capital Offense Need Not be Alleged.** — The defendant's murder indictment complied with the requirements of this section and did not violate his constitutional rights; because defendant had notice that he was charged with first degree murder and the elements thereof, as well as his eligibility for the death penalty, the State was not required to allege the supporting aggravating circumstances. State v. Holman, 353 N.C. 174, 540 S.E.2d 18, 2000 N.C. LEXIS 909 (2000), cert. denied, 534 U.S. 910, 122 S. Ct. 250, 151 L. Ed. 2d 181 (2001), cert. denied, — N.C. —, 619 S.E.2d 854 (2005).

**No Requirement to Instruct Indicting Grand Jury on Elements of Crime.** — A court is not required to instruct the indicting grand jury on the elements of the crime in question. State v. Treadwell, 99 N.C. App. 769, 394 S.E.2d 245 (1990).

**An indictment returned by a grand jury not legally constituted is not a valid indictment.** State v. Yoes, 271 N.C. 616, 157 S.E.2d 386 (1967); State v. Ray, 274 N.C. 556, 164 S.E.2d 457 (1968).

**Dismissal — Where Indictment Is Invalid.** — When the indictment charging defendant with the commission of crime is invalid, defendant's motion to dismiss the action for want of jurisdiction should be allowed. State v. Beasley, 208 N.C. 318, 180 S.E. 598 (1935).

While defendant abandoned error as to one of the six challenged indictments filed against him, each alleging charges of first-degree sexual offense, the trial court erred in failing to dismiss the remaining five upon defendant's motion as fatally defective, given that they erroneously charged two similar but distinct crimes and effectively charged neither. State v. Hill, 185 N.C. App. 216, 647 S.E.2d 475, 2007 N.C. App. LEXIS 1712 (2007), rev'd, 362 N.C. 169, 655 S.E.2d 831 (2008), State v. Hill, 185 N.C. App. 216, 647 S.E.2d 475, 2007 N.C. App. LEXIS 1712 (2007).

**Same — Where Proceedings Are Invalid.** — This section means action by the grand jury according to the practice at common law, and does not permit open hearings before the grand jury. Thus, where the court sent for the grand jury and permitted the solicitor to examine a State's witness in open court before the grand jury, after the grand jury had returned two identical bills of indictment against the defendant, submitted on successive days, "not a true bill," and thereafter the solicitor submitted another identical bill to the grand jury which was returned "a true bill," defendant's verified plea in abatement and motion to quash, made before pleading, should have been allowed, and upon appeal from the court's denial of the motion the judgment would be reversed, with leave to the solicitor to send another bill before a different grand jury, if so advised. State v. Ledford, 203 N.C. 724, 166 S.E. 917 (1932).

Where defendant was tried at a special term of criminal court upon an indictment returned by a grand jury drawn for the special term, but there was no order by the Governor that a grand jury be drawn for such term as provided by former G.S. 7-78, defendant's motion in arrest of judgment, made for the first time in the Supreme Court upon appeal, would be allowed pursuant to this section. State v. Baxter, 208 N.C. 90, 179 S.E. 450 (1935). See also, State v. Boykin, 211 N.C. 407, 191 S.E. 18 (1937).

**It is competent to send as many bills of indictment as may be necessary** to the grand jury to get before them necessary witnesses and evidence from which they may decide the propriety of submitting the accused to trial. State v. Lewis, 226 N.C. 249, 37 S.E.2d 691 (1946); State v. Mercer, 249 N.C. 371, 106 S.E.2d 866 (1959).

**Assault with Deadly Weapon.** — A justice of the peace had no jurisdiction of an assault with a deadly weapon except to bind the defendant over, and by the provisions of this section, the superior court could proceed to trial only upon indictment duly found and returned. State v. Myrick, 202 N.C. 688, 163 S.E. 803 (1932). See also, State v. Clegg, 214 N.C. 675, 200 S.E. 371 (1939).

**Attempted Murder Indictment.** — Where defendant's indictment for attempted first degree murder was deficient, under N.C. Const. art. I, § 22 and G.S. 15-144, because it omitted phrase "and of his malice aforethought," the appellate court, after defendant was convicted by a jury of attempted first degree murder, arrested the judgment and remanded the matter for sentencing and the entry of judgment for attempted voluntary manslaughter, which the indictment supported; the failure of the criminal pleading to charge the essential elements of the stated offense was an error of law that could be corrected upon appellate review even though no corresponding objection, exception, or motion was made in the trial division. State v. Bullock, 154 N.C. App. 234, 574 S.E.2d 17, 2002 N.C. App. LEXIS 1476 (2002), appeal dismissed, 357 N.C. 64, 579 S.E.2d 396 (2003), cert. denied, 540 U.S. 928, 124 S. Ct. 338, 157 L. Ed. 2d 231 (2003).

**Kidnapping.** — An indictment charging that defendant "unlawfully, did feloniously and forcibly kidnap" a person named was not defective for failure to charge additionally that the victim was forcibly carried away against her will. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

**A preliminary hearing** is not a constitutional requirement nor is it essential to the finding of an indictment. State v. Hairston, 280 N.C. 220, 185 S.E.2d 633, cert. denied, 409 U.S. 888, 93 S. Ct. 194, 34 L. Ed. 2d 145 (1972).

**Motion to Suppress Properly Denied.** — Because defendant's initial seizure and incarceration were not unconstitutional, the trial court did not err in denying defendant's motion to suppress the evidence seized from defendant's person. State v. Hocutt, 177 N.C. App. 341, 628 S.E.2d 832, 2006 N.C. App. LEXIS 966 (2006).

**Applied** in State v. Brown, 21 N.C. App. 87, 202 S.E.2d 798 (1974); State v. Tatum, 44 N.C. App. 77, 259 S.E.2d 774 (1979); State v. Effler, 309 N.C. 742, 309 S.E.2d 203 (1983); State v. Hunt, 357 N.C. 257, 582 S.E.2d 593, 2003 N.C. LEXIS 746 (2003); State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 2004 N.C. LEXIS 340 (2004); State v. Price, — N.C. App. —, 611 S.E.2d 891 (2005).

**Cited** in State v. Hyman, 164 N.C. 411, 79 S.E. 284 (1913); State v. Pulliam, 184 N.C. 681, 114 S.E. 394 (1922); State v. Midyette, 45 N.C. App. 87, 262 S.E.2d 353 (1980); State v. Sturdivant, 304 N.C. 293, 283 S.E.2d 719 (1981); State v. Carson, 320 N.C. 328, 357 S.E.2d 662 (1987); State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991); State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374 (1992); State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (1994); State v. Snyder, 343 N.C. 61, 468 S.E.2d 221 (1996); State v. Hall, 131 N.C. App. 427, 508 S.E.2d 8 (1998); State v. Price, — N.C. App. —, 611 S.E.2d 891 (2005).

## Sec. 23. Rights of accused.

In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for defense, and not be compelled to give self-incriminating evidence, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty.

**Cross References.** — As to the rights of defendants in criminal cases, see also N.C. Const., Art. I, § 19 and the notes thereunder. As to modes of prosecution, see N.C. Const., Art. I, § 22. As to the right of jury trial in criminal cases, see N.C. Const., Art. I, § 24. As to representation of indigent defendants, see Chapter 7A, Articles 36 through 38A (G.S.

7A-450 et seq.). As to testimony of defendants in criminal actions, see G.S. 8-54. As to witness testifying to any unlawful gaming done by himself or others, see G.S. 8-55.

**History.** — The provisions of this section are similar to those of Art. I, § 11, Const. 1868, as amended in 1946.

**Legal Periodicals.** — As to the right of defendant to accompany the jury to the scene of the crime, see 12 N.C.L. Rev. 268 (1934).

For article discussing the limits to confrontation, see 15 N.C.L. Rev. 229 (1937).

For note as to compelling accused to speak so that witness may identify his voice, see 27 N.C.L. Rev. 262 (1949).

For comment on right of confrontation, see 28 N.C.L. Rev. 205 (1950).

For note on self-incrimination and the use of chemical tests to determine intoxication, see 30 N.C.L. Rev. 302 (1952).

For note on the right to counsel, see 32 N.C.L. Rev. 331 (1954).

For note on right of confrontation at presentence investigation, see 41 N.C.L. Rev. 260 (1963).

For note on self-incrimination and the possibility of subjecting witness to punitive damages, see 42 N.C.L. Rev. 918 (1964).

For comment on right to counsel, see 44 N.C.L. Rev. 161 (1965).

For comment on the Sixth Amendment right of confrontation, as made obligatory in State prosecutions, see 44 N.C.L. Rev. 173 (1965).

For case law survey as to coerced confessions, see 45 N.C.L. Rev. 869 (1967).

For case law survey as to right to counsel, see 45 N.C.L. Rev. 875 (1967).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1043 (1981).

For note on the rape victim shield statute, see 3 Campbell L. Rev. 113 (1981).

For survey of 1982 law on evidence, see 61 N.C.L. Rev. 1126 (1983).

For 1984 survey, "When Is a Confession Coerced and When Is It Voluntary," see 63 N.C.L. Rev. 1214 (1985).

For recent development, "The Defense Calls ... the Accuser? State v. Brigman and How the North Carolina Court of Appeals Misconstrued Crawford's Application to Available Witnesses," see 84 N.C. L. Rev. 2082 (2006).

## CASE NOTES

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### I. GENERAL CONSIDERATION.

***Editor's Note.*** — *Some of the cases cited below were decided under former Art. I, § 11, Const. 1868, before and after its amendment in 1946.*

**Search and Seizure.** — Where an officer observed defendant drive over a curb, back away from the officer, and reach into a pocket in a location known for drug activity, defendant's motion to suppress was properly denied because the officer had reasonable suspicion to make an investigatory stop and had probable cause to seize a film canister from defendant's pocket during a pat-down for weapons based on, inter alia, defendant's actions, the area's reputation, and the officer's prior experiences. State v. Robinson, 189 N.C. App. 454, 658 S.E.2d 501, 2008 N.C. App. LEXIS 648 (2008).

**Private Counsel May Assist Prosecuting Attorney.** — The trial court has discretionary power to allow private counsel to assist the prosecuting attorney in the trial of a case, it being the duty of the court to permit only such assistance as fairness and justice may require, and such power does not impinge on the provisions of this section. State v. Carden, 209 N.C. 404, 183 S.E. 898, cert. denied, 298 U.S. 682, 56 S. Ct. 960, 80 L. Ed. 1402 (1936).

**Prejudicial Argument.** — In a capital case, any argument made by the prosecuting attorney or by private prosecution appearing for the State which suggests to the jury that they can depend upon either judicial or executive review to correct any errors in their verdict and to share their responsibility for it is an abuse of privilege and is prejudicial to the defendant. State v. White, 286 N.C. 395, 211 S.E.2d 445 (1975).

Defendant's contention that district attorney's argument to the jury referring repeatedly to the fact that defense counsel was from another part of the State constituted prejudicial error and denied defendant due process and the effective assistance of counsel would be overruled where defense counsel had opened the door with abusive comments attacking the credibility of two State witnesses and the honesty of two local law-enforcement officers. State v. McCall, 289 N.C. 512, 223 S.E.2d 303, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

The defendant's constitutional rights under Article I, Sections 19, 23, and 27 of the North Carolina Constitution were not violated by the prosecution's argument in opposition to the "catchall" mitigating circumstance of G.S. 15A-2000(f) that the jury should not give any mitigating value to the fact that his accomplice was not sentenced to death where the prosecution did not imply that the accomplice's sentence could be treated as a nonstatutory aggravating circumstance. State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1, 2000 N.C. LEXIS 352 (2000), cert. denied, 531 U.S. 1019, 121 S. Ct. 582, 148 L. Ed. 2d 498 (2000).

**Non-Prejudicial Argument.** — Prosecutor's arguments, including statements comparing defendant's cozy life in prison and his numerous protections under the Constitution with victims' lack of opportunities, was unlikely to have influenced the jury's sentencing recommendations and, therefore, did not deny defendant his constitutional due process rights. State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

**Informing Defendant of His Rights.** — Defendant was not "in custody" for Miranda purposes as a reasonable person in defendant's position would have concluded he was free to terminate the interviews if he so chose. State v. Corbett, 339 N.C. 313, 451 S.E.2d 252 (1994).

**Right to Testify.** — The Fourth Amendment to the United States Constitution and N.C. Const., Art. I, § 23 provide a criminal defendant with the right to testify, but do not place upon the trial court the duty of informing a pro se or represented defendant of this right; the trial court did not err by not asking defendant whether he wished to present evidence or testify on his own behalf after defense counsel told the court that defendant would offer no evidence. State v. Murray, 154 N.C. App. 631, 572 S.E.2d 845, 2002 N.C. App. LEXIS 1532 (2002), cert. denied, 357 N.C. 467, 586 S.E.2d 778 (2003).

**Trial court did not deprive the defendant of a fair trial by denying the defendant's pre-trial motion to continue** the trial to a date more than 20 days after the defendant was charged in a true bill of indictment with habitual felon status; the assistant district attorney handling the case, notified the court that the State was not going to proceed with the habitual felon charge until a later date, if at all, and after the jury verdict was announced, the State dismissed the defendant's habitual felon indictment so that defendant was sentenced solely on the substantive charges against the defendant. State v. Adams, 156 N.C. App. 318, 576 S.E.2d 377, 2003 N.C. App. LEXIS 102 (2003), cert. denied, 357 N.C. 166, 580 S.E.2d 698 (2003).

**When a motion to continue is based on a constitutional right, the trial court's ruling becomes a question of law** and, upon appeal, it is subject to review by examination of the particular circumstances as presented by the record, and the denial of a motion to continue, regardless of its nature, is grounds for a new trial only upon a showing by defendant that the denial was erroneous and that his case was prejudiced as a result of the error. If the error amounts to a constitutional violation, as is here contended, there is prejudice requiring a new trial unless the State satisfies this court that the error is harmless beyond a reasonable doubt. State v. Gardner, 322 N.C. 591, 369 S.E.2d 593 (1988).

**Jury Instructions.** — Pattern jury instruction used by trial court was internally consistent and meaningful, and did not misuse the term "extenuating," nor define the term "mitigating circumstance" in such a way as to confuse jurors or violate the defendant's due process and fundamental fairness rights. State v. Peterson, 350 N.C. 518, 516 S.E.2d 131, 1999 N.C. App. LEXIS 419 (1999), cert. denied, 528 U.S. 1164, 120 S. Ct. 1181, 145 L. Ed. 2d 1087 (2000).

While trial court's jury instructions may have been confusing initially, the court ultimately set forth the required elements as to felonious assault with a deadly weapon inflicting serious injury and, therefore, did not violate the defendant's constitutional rights under this section and N.C. Const., Art. I, Sections 19 and 27. State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

Defendant was not deprived of his constitutional rights where no conflict existed between the "Issues and Recommendation as to Punishment" form and the oral instructions given by the trial court. State v. Peterson, 350 N.C. 518, 516 S.E.2d 131, 1999 N.C. App. LEXIS 419 (1999), cert. denied, 528 U.S. 1164, 120 S. Ct. 1181, 145 L. Ed. 2d 1087 (2000).

**Instruction Informing Jury of Death Sentence.** — Denial of defendant's written request for an instruction that "should you [the jury] return a verdict of guilty to the alleged crime of rape, the death penalty will be imposed by this Court" did not deny him his constitutional right of due process as guaranteed by U.S. Const., Amends. V and XIV and by N.C. Const., Art. I, §§ 19 and 36 and this section, since the record revealed that each juror knew that the sentence of death would be imposed upon the return of a verdict of guilty. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

**Pecuniary Gain Instruction Not Violative of Constitutional Rights.** — Jury instruction regarding capital felony committed for pecuniary gain to support submission of aggravating circumstance under G.S. 15A-2000(e)(6) did not violate defendant's due process and fair trial rights under this section and N.C., Art. I, § 19 although gun may have been intended for his personal use, it had pecuniary value. State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

**Error in conducting an informal meeting in chambers to discuss jury instructions,** outside the presence of defendant, prior to the formal charge conference held in open court, was harmless beyond a reasonable doubt. State v. Brogden, 329 N.C. 534, 407 S.E.2d 158 (1991).

**Bench Conferences.** — Where the trial court reconstructed the substance of the bench conferences with the prospective jurors for the record and, before ruling, gave the defendant an opportunity to be heard, these exchanges at the bench which constituted reversible error did not deprive the defendant of his constitutional right to be present at every state of the proceeding. State v. Ali, 329 N.C. 394, 407 S.E.2d 183 (1991).

Although trial court held private, unrecorded, sidebar conferences with a number of jury pool members, because these conferences took place prior to the commencement of defendant's trial, no error, constitutional or otherwise, was committed. State v. Rannels, 333 N.C. 644, 430 S.E.2d 254 (1993).

**Judge's Contacts with Jurors.** — The transcript lent support to contention that the trial judge did in fact go to the grand jury room to instruct the prospective jurors that they were at break; however, there was no prejudicial error based on this contact. State v. Gay, 334 N.C. 467, 434 S.E.2d 840 (1993).

**Right to Fair Trial Abridged by Trial Court's Comments.** — Defendant was entitled to a new trial, as the trial court's extraneous comments regarding defense counsel, including a statement to the effect that "13 people" would get sick if defense counsel explored the same point one more time and that defense counsel was acting unethically regarding a witness statement given to police that the defense counsel referred to but which was not admitted into evidence, were improper and suggested the trial court was favoring the State in defendant's assault trial; since the comments were made in front of the jury, defendant was entitled to a new trial on the charge. State v. Brinkley, 159 N.C. App. 446, 583 S.E.2d 335, 2003 N.C. App. LEXIS 1536 (2003).

Defendant's convictions were reversed as a trial court made comments that deprived defendant of a fair trial and violated his rights to due process when the trial court, inter alia: (1) sustained the trial court's own objections and refused to allow defendant to continue to question the state's star witness about the witness's use of a false identification; (2) admonished defense counsel when counsel attempted to question the witness about the witness's criminal record; (3) chided counsel when the trial court ruled on the state's objections; and (4) scolded counsel outside the presence of the jury when counsel attempted to make a record of the answers to questions that the trial court would not allow counsel to ask in the jury's presence. State v. McLean, 181 N.C. App. 469, 640 S.E.2d 770, 2007 N.C. App. LEXIS 260 (2007).

**Swearing of Prospective Jurors.** — Defendant had no right to be presen't when prospective jurors were preliminarily sworn, oriented and qualified for jury service in general, without regard to any particular case or trial. State v. Workman, 344 N.C. 482, 476 S.E.2d 301 (1996).

**The common law does not recognize a right of discovery** in criminal cases. State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976).

**Destruction of Evidence.** — Destruction of marijuana by the State for lack of storage facilities, where the State made random samples, photographs and a copy of the laboratory report available to defendants, did not violate defendants' rights of confrontation under this section, nor infringe defendants' due process rights under the federal and State Constitutions. State v. Anderson, 57 N.C. App. 602, 292 S.E.2d 163, cert. denied, 306 N.C. 559, 294 S.E.2d 372 (1982).

**One who is detained under a charge of driving under the influence** has the same constitutional and statutory rights, including the rights given under this section, as any other accused. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

**Revocation of Driver's License Cannot Constitute Double Jeopardy.** — Revocation of defendant's driver's license did not constitute criminal punishment and, thus, defendant's conviction for driving while impaired did not violate N.C. Const., Art. I, §§ 19 and 23. State v. Hinchman, — N.C. App. —, 666 S.E.2d 199, 2008 N.C. App. LEXIS 1667 (2008).

**Denial of access to a witness to a breathalyzer test when the State's sole evidence of the offense of driving while impaired is the personal observations of the authorities** would constitute a flagrant violation of defendant's constitutional right to obtain witnesses under this section as a matter of law and would require that the charges be dismissed. State v. Ferguson, 90 N.C. App. 513, 369 S.E.2d 378, cert. denied, 323 N.C. 367, 373 S.E.2d 551 (1988).

**Nonsupport.** — In a prosecution under G.S. 49-2, a verdict upon the issues of paternity and nonsupport, if resolved in favor of the State, is sufficient to support a judgment against defendant without a general verdict by the jury of guilty. This does not contravene the provisions of this section and N.C. Const., Art. I, § 24, requiring trial and verdict by jury in criminal cases. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

**Interrogation.** — Second interrogation of a defendant was not unconstitutional under the facts of the case, and the trial court did not err by admitting the statement obtained by law enforcement officials during that second interrogation because uncontradicted evidence introduced during the suppression hearing supported the conclusion that the law enforcement officials involved in the investigation of one incident honored the defendant's invocation of his right to remain silent regarding another incident, and thereafter no questioning touched on that other incident and fresh Miranda warnings were given. State v. Jacobs, 174 N.C. App. 1, 620 S.E.2d 204, 2005 N.C. App. LEXIS 2279 (2005), vacated in part, rev'd in part, on other grounds, 361 N.C. 565, 648 S.E.2d 841 (2007).

**Defendan'ts Failure to Request Competency Hearing or Make Motion Regarding Competency Waived Due Process Claim.** — Defendant waived the claim that defendant's right to due process was violated when the trial court failed to ensure that defendant had the mental capacity to understand the nature and object to the proceedings, to consult with counsel, and to assist in her defense, because defendant did not request a competency hearing or make a motion detailing the conduct resulting in a question as to defendant's capacity to proceed after defendant's was not given anti-anxiety medication on one day of trial. State v. Goode, — N.C. App. —, 677 S.E.2d 507, 2009 N.C. App. LEXIS 728 (2009).

**Rebuttal of Insanity Defense with Psychiatric Evidence.** — A fair opportunity to rebut a defendant's insanity defense may include more than one psychiatric examination of the defendant. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

When a defendant relies on the insanity defense and introduces expert testimony on his mental status, the prosecution may introduce expert testimony derived from prior court-ordered psychiatric examinations for the purpose of rebutting that testimony without implicating U.S. Const., Amend. V or this section of the Constitution of North Carolina. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

**Defendant's absence during the final two hours of jury deliberations,** did not result in substantial and irreparable prejudice to her case and was harmless error with regard to denying her the constitutional right to be present at every stage of her trial. State v. Webster, 111 N.C. App. 72, 431 S.E.2d 808, cert. denied, 335 N.C. 180, 438 S.E.2d 206 (1993), aff'd, 337 N.C. 674, 447 S.E.2d 349 (1994), cert. denied, 335 N.C. 180, 438 S.E.2d 206 (1993).

**Defendant's right to be present at every stage of the trial** was not violated. State v. May, 334 N.C. 609, 434 S.E.2d 180 (1993), cert. denied, 510 U.S. 1198, 114 S. Ct. 1310, 127 L. Ed. 2d 661 (1994).

Trial judge's ex parte interrogations of two seated jurors, conferences with counsel in chambers, out of the presence of the defendant, and the judge's failure to reconstruct those actions in the defendant's presence violated the defendant's right to be present at every stage; however, because the court found that the error was harmless beyond a reasonable doubt, the defendant was not entitled to a new trial. State v. Williams, 343 N.C. 345, 471 S.E.2d 379 (1996), cert. denied, 519 U.S. 1061, 117 S. Ct. 695, 136 L. Ed. 2d 618 (1997).

Trial court did not violate the defendant's right to a fair trial because the defendant's trial had not commenced when the court held unrecorded bench conferences and deferred five jurors before the trial court began defendant's trial. The five jurors were not excused at a stage of the defendant's trial, and the defendant did not have the right to be present at the conferences. State v. Carpenter, 155 N.C. App. 35, 573 S.E.2d 668, 2002 N.C. App. LEXIS 1624 (2002).

Although defendant's constitutional right to be present at every stage of defendant's criminal trial was violated when the trial court refused to allow defense counsel to review jury questions, the violation of that right was harmless beyond a reasonable doubt; the record revealed that the questions indicated that the jury had already agreed unanimously on second-degree murder, which was defendant's ultimate conviction, and was confused about whether their rejection of first-degree murder had to be unanimous. State v. Smith, 188 N.C. App. 207, 654 S.E.2d 730, 2008 N.C. App. LEXIS 92 (2008).

**Failure to Include Defendant in Discussion Regarding Removal of Leg Shackles.** — Even if trial judge's conversation with defendant's standby counsel, held outside defendant's presence, concerning whether or not to remove his leg shackles constituted a "stage" in the proceeding, the error in excluding defendant was harmless beyond a reasonable doubt. State v. Thomas, 134 N.C. App. 560, 518 S.E.2d 222, 1999 N.C. App. LEXIS 857 (1999), appeal dismissed, cert. denied, 351 N.C. 119, 541 S.E.2d 468 (1999).

**Judge's announcement of his ruling in open court could not reasonably be characterized as a hearing,** much less one at which defendant's presence was required where judge simply took a final step in the process of deciding whether to release any part of defendant's prison records to the prosecution and announced his decision from the bench. State v. Rich, 346 N.C. 50, 484 S.E.2d 394 (1997), cert. denied, 522 U.S. 1002, 118 S. Ct. 573, 139 L. Ed. 2d 412 (1997).

**Trial Court Did Not Deprive the Defendant of a Fair Trial by Denying the Defendant's Motion for a Mistrial.** — Defendant was not denied his rights to confrontation, to effective assistance of counsel, to due process, to a jury trial, and to be free from cruel and unusual punishment when the trial court denied defendant's motion for a mistrial based on the alleged misconduct of a juror; the juror's inadvertent failure to disclose 40-year-old information she had forgotten did not amount to concealment, and the juror demonstrated no bias. State v. Maske, 358 N.C. 40, 591 S.E.2d 521, 2004 N.C. LEXIS 18 (2004).

**Right to Remain Silent Not Violated.** — State's cross-examination of defendant and its closing argument did not violate defendant's right to remain silent; it was not apparent that the State was commenting on post-Miranda silence when the State asked defendant "So, you didn't want to the them (the police) that you had acted in self-defense?" In addition, the closing argument was not improper and was supported by witnesses' testimony. State v. Herndon, 177 N.C. App. 353, 629 S.E.2d 170, 2006 N.C. App. LEXIS 961 (2006), review denied, appeal dismissed, 360 N.C. 539, 634 S.E.2d 542 (2006).

**Defense Counsel Not Ineffective for Failing to Object Where Testimony Properly Admitted.** — Testimony regarding an officer's interaction with a detective and a third individual was non-hearsay since it was not admitted to prove the truth of the matter asserted, but rather to show how the officer formed a reasonable suspicion that defendant was involved in the robbery at issue, which in turn justified including defendant's photo in a lineup shown to the robbery victim; since this testimony was properly admitted, defense counsel was not ineffective for failing to object to it. State v. Alexander, 177 N.C. App. 281, 628 S.E.2d 434, 2006 N.C. App. LEXIS 843 (2006), cert. denied, appeal dismissed, 361 N.C. 358, 644 S.E.2d 357 (2007).

Trial counsel's failure to object to the admission of testimony of a director of a rape crisis center about the general reactions and characteristics of sexual assault victims was not ineffective assistance of counsel as defendant failed to show that trial counsel's failure to object fell below a standard of reasonableness, or that the trial result would have been different absent the error. State v. Simmons, 191 N.C. App. 224, 662 S.E.2d 559, 2008 N.C. App. LEXIS 1188 (2008).

**Applied** in State v. Williams, 18 N.C. App. 145, 196 S.E.2d 370 (1973); State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975); State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976); State v. Legette, 292 N.C. 44, 231 S.E.2d 896 (1977); State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980); State v. Maher, 54 N.C. App. 639, 284 S.E.2d 351 (1981); Stone v. Martin, 56 N.C. App. 473, 289 S.E.2d 898 (1982); State v. Washington, 59 N.C. App. 490, 297 S.E.2d 170 (1982); State v. Roberts, 310 N.C. 428, 312 S.E.2d 477 (1984); State v. Colbert, 311 N.C. 283, 316 S.E.2d 79 (1984); State v. Matthews, 69 N.C. App. 526, 317 S.E.2d 62 (1984); State v. Hunt, 72 N.C. App. 59, 323 S.E.2d 490 (1984); State v. Richardson, 99 N.C. App. 496, 393 S.E.2d 333 (1990); State v. Eason, 328 N.C. 409, 402 S.E.2d 809 (1991); State v. Monroe, 330 N.C. 846, 412 S.E.2d 652 (1992); State v. Bromfield, 332 N.C. 24, 418 S.E.2d 491 (1992); State v. Crummy, 107 N.C. App. 305, 420 S.E.2d 448 (1992); State v. Cummings, 332 N.C. 487, 422 S.E.2d 692 (1992); State v. Harris, 111 N.C. App. 58, 431 S.E.2d 792 (1993); State v. Miller, 344 N.C. 658, 477 S.E.2d 915 (1996); State v. Greene, 351 N.C. 562, 528 S.E.2d 575, 2000 N.C. LEXIS 355 (2000); State v. Quick, 152 N.C. App. 220, 566 S.E.2d 735, 2002 N.C. App. LEXIS 878 (2002); State v. Smith, 155 N.C. App. 500, 573 S.E.2d 618, 2002 N.C. App. LEXIS 1636 (2002); State v. Petro, 167 N.C. App. 749, 606 S.E.2d 425, 2005 N.C. App. LEXIS 16 (2005); State v. Hightower, 168 N.C. App. 661, 609 S.E.2d 235, 2005 N.C. App. LEXIS 454 (2005); State v. Duke, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005); State v. Love, 177 N.C. App. 614, 630 S.E.2d 234, 2006 N.C. App. LEXIS 1189 (2006); State v. Person, 187 N.C. App. 512, 653 S.E.2d 560, 2007 N.C. App. LEXIS 2574 (2007); State v. Calhoun, 189 N.C. App. 166, 657 S.E.2d 424, 2008 N.C. App. LEXIS 402 (2008).

**Cited** in State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971); In re Reddy, 16 N.C. App. 520, 192 S.E.2d 621 (1972); State v. Hardy, 17 N.C. App. 169, 193 S.E.2d 459 (1972); State v. Lankford, 31 N.C. App. 13, 228 S.E.2d 641 (1976); In re Arthur, 291 N.C. 640, 231 S.E.2d 614 (1977); State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977); State v. Eatman, 34 N.C. App. 665, 239 S.E.2d 633 (1977); State v. Creech, 37 N.C. App. 261, 245 S.E.2d 817 (1978); State v. Brooks, 38 N.C. App. 445, 248 S.E.2d 369 (1978); State v. Evans, 40 N.C. App. 390, 253 S.E.2d 35 (1979); State v. Hunt, 297 N.C. 131, 254 S.E.2d 19 (1979); State v. Allen, 301 N.C. 489, 272 S.E.2d 116 (1980); State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981); State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981); State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981); State v. Sturdivant, 304 N.C. 293, 283 S.E.2d 719 (1981); State v. Newman, 308 N.C. 231, 302 S.E.2d 174 (1983); State v. Wise, 64 N.C. App. 108, 306 S.E.2d 569 (1983); State v. Davis, 61 N.C. App. 522, 300 S.E.2d 861 (1983); State v. Abney, 79 N.C. App. 649, 339 S.E.2d 841 (1986); State v. Kuplen, 316 N.C. 387, 343 S.E.2d 793 (1986); State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986); State v. Worthington, 84 N.C. App. 150, 352 S.E.2d 695 (1987); State v. Kennedy, 320 N.C. 20, 357 S.E.2d 359 (1987); State v. Carson, 320 N.C. 328, 357 S.E.2d 662 (1987); State v. Kerley, 87 N.C. App. 240, 360 S.E.2d 464 (1987); State v. Jones, 322 N.C. 406, 368 S.E.2d 844 (1988); State v. Hope, 96 N.C. App. 498, 386 S.E.2d 224 (1989); State v. Seaberry, 97 N.C. App. 203, 388 S.E.2d 184 (1990); State v. Jones, 97 N.C. App. 189, 388 S.E.2d 213 (1990); State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991); State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802 (1992); State v. James, 111 N.C. App. 785, 433 S.E.2d 755 (1993); State v. Medlin, 333 N.C. 280, 426 S.E.2d 402 (1993); State v. Ainsworth, 109 N.C. App. 136, 426 S.E.2d 410 (1993); State v. Rogers, 109 N.C. App. 491, 428 S.E.2d 220 (1993); State v. Harris, 333 N.C. 544, 428 S.E.2d 823 (1993); State v. Minter, 111 N.C. App. 40, 432 S.E.2d 146 (1993); State v. Harrington, 335 N.C. 105, 436 S.E.2d 235 (1993); State v. Lee, 335 N.C. 244, 439 S.E.2d 547 (1994); State v. McIntosh, 336 N.C. 517, 444 S.E.2d 438 (1994); State v. Fisher, 336 N.C. 684, 445 S.E.2d 866 (1994); State v. Peterson, 337 N.C. 384, 446 S.E.2d 43 (1994); State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (1994); State v. Thompson, 118 N.C. App. 33, 454 S.E.2d 271 (1995); State v. Porter, 340 N.C. 320, 457 S.E.2d 716 (1995); State v. Hinson, 341 N.C. 66, 459 S.E.2d 261 (1995); State v. Burr, 341 N.C. 263, 461 S.E.2d 602 (1995); State v. Frye, 341 N.C. 470, 461 S.E.2d 664 (1995); State v. Robinson, 342 N.C. 74, 463 S.E.2d 218 (1995); State v. Jaynes, 342 N.C. 249, 464 S.E.2d 448 (1995); State v. Chapman, 342 N.C. 330, 464 S.E.2d 661 (1995); State v. Mundine, 122 N.C. App. 707, 471 S.E.2d 438 (1996); State v. Bond, 345 N.C. 1, 478 S.E.2d 163 (1996); State v. Westbrooks, 345 N.C. 43, 478 S.E.2d 483 (1996); State v. Woods, 345 N.C. 294, 480 S.E.2d 647 (1997); State v. Larry, 345 N.C. 497, 481 S.E.2d 907 (1997); State v. Banks, 125 N.C. App. 681, 482 S.E.2d 41 (1997); State v. Hunt, 345 N.C. 720, 483 S.E.2d 417 (1997); State v. Rich, 346 N.C. 50, 484 S.E.2d 394 (1997); State v. Jackson, 126 N.C. App. 129, 484 S.E.2d 405 (1997); State v. Jones, 346 N.C. 704, 487 S.E.2d 714 (1997); State v. Cummings, 346 N.C. 291, 488 S.E.2d 550 (1997); State v. Jones, 347 N.C. 193, 491 S.E.2d 641 (1997); State v. Clark, 128 N.C. App. 87, 493 S.E.2d 770 (1997); State v. White, 349 N.C. 535, 508 S.E.2d 253 (1998); State v. Davis, 349 N.C. 1, 506 S.E.2d 455 (1998); State v. Blackmon, 130 N.C. App. 692, 507 S.E.2d 42 (1998); State v. Wagoner, 131 N.C. App. 285, 506 S.E.2d 738 (1998); State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998); State v. Anderson, 350 N.C. 152, 513 S.E.2d 296, 1999 N.C. App. LEXIS 239 (1999); Staton v. Brame, 136 N.C. App. 170, 523 S.E.2d 424, 1999 N.C. App. LEXIS 1303 (1999); State v. Guice, 141 N.C. App. 177, 541 S.E.2d 474, 2000 N.C. App. LEXIS 1402 (2000); State v. Ward, 354 N.C. 231, 555 S.E.2d 251, 2001 N.C. LEXIS 1097 (2001); State v. Call, 353 N.C. 400, 545 S.E.2d 190, 2001 N.C. LEXIS 429 (2001); In re Allison, 143 N.C. App. 586, 547 S.E.2d 169, 2001 N.C. App. LEXIS 329 (2001); State v. Mason, 144 N.C. App. 20, 550 S.E.2d 10, 2001 N.C. App. LEXIS 339 (2001); State v. Wiley, 355 N.C. 592, 565 S.E.2d 22, 2002 N.C. LEXIS 552 (2002); State v. Trull, 153 N.C. App. 630, 571 S.E.2d 592, 2002 N.C. App. LEXIS 1263 (2002); Pittman v. N.C. Dep't of Health & Human Servs., 155 N.C. App. 268, 573 S.E.2d 628, 2002 N.C. App. LEXIS 1579 (2002); State v. Howard, 158 N.C. App. 226, 580 S.E.2d 725, 2003 N.C. App. LEXIS 1049 (2003); State v. Rasmussen, 158 N.C. App. 544, 582 S.E.2d 44, 2003 N.C. App. LEXIS 1219 (2003); State v. Allen, 162 N.C. App. 587, 592 S.E.2d 31, 2004 N.C. App. LEXIS 246 (2004); State v. Thompson, 359 N.C. 77, 604 S.E.2d 850, 2004 N.C. LEXIS 1197 (2004); State v. Morgan, 359 N.C. 131, 604 S.E.2d 886, 2004 N.C. LEXIS 1199 (2004); State v. Price, — N.C. App. —, 611 S.E.2d 891 (2005); State v. Campbell, 359 N.C. 644, 617 S.E.2d 1, 2005 N.C. LEXIS 842 (2005); State v. Chivers, 180 N.C. App. 275, 636 S.E.2d 590, 2006 N.C. App. LEXIS 2330 (2006); State v. Gillespie, 180 N.C. App. 514, 638 S.E.2d 481, 2006 N.C. App. LEXIS 2512 (2006); State v. Robinson, 187 N.C. App. 795, 653 S.E.2d 889, 2007 N.C. App. LEXIS 2556 (2007); State v. Whaley, 362 N.C. 156, 655 S.E.2d 388, 2008 N.C. LEXIS 31

(2008); State v. Wilson, — N.C. App. —, 665 S.E.2d 751, 2008 N.C. App. LEXIS 1615 (2008); State v. Gabriel, — N.C. App. —, 665 S.E.2d 581, 2008 N.C. App. LEXIS 1627 (2008); Powers v. Tatum, — N.C. App. —, 676 S.E.2d 89, 2009 N.C. App. LEXIS 527 (2009); State v. Rouse, — N.C. App. —, 679 S.E.2d 520, 2009 N.C. App. LEXIS 1162 (July 21, 2009).

## II. RIGHT TO BE INFORMED OF ACCUSATION.

**Purpose of the provision guaranteeing the right to be informed** of the accusation is to enable the defendant to have a fair and reasonable opportunity to prepare his defense, to avail himself of his conviction or acquittal as a bar to subsequent prosecution for the same offense, and to enable the court, on conviction, to pronounce sentence according to law. State v. Hartley, 39 N.C. App. 70, 249 S.E.2d 453 (1978), cert. denied, 296 N.C. 738, 254 S.E.2d 179 (1979); State v. Effler, 309 N.C. 742, 309 S.E.2d 203 (1983); State v. Stills, 310 N.C. 410, 312 S.E.2d 443 (1984).

**The purposes of this section** and N.C. Const., Art. I, § 22 are (1) to provide certainty so as to identify the offense, (2) to protect the accused from twice being put in jeopardy for the same offense, (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of guilty or nolo contendere, to pronounce sentence according to the rights of the case. State v. Barnes, 253 N.C. 711, 117 S.E.2d 849 (1961); State v. Foster, 10 N.C. App. 141, 177 S.E.2d 756 (1970); State v. Sutton, 14 N.C. App. 422, 188 S.E.2d 596 (1972).

**Section Embodies Common-Law Rule.** — This constitutional guaranty is, in essence, an embodiment of the common-law rule requiring the charge against the accused to be set out in the indictment or warrant with sufficient certainty to identify the offense with which he is sought to be charged, protect him from being twice put in jeopardy for the same offense, enable him to prepare for trial, and enable the court to proceed to judgment according to law in case of conviction. State v. Jenkins, 238 N.C. 396, 77 S.E.2d 796 (1953); State v. Nugent, 243 N.C. 100, 89 S.E.2d 781 (1955).

**When Jeopardy Attaches for Dismissed Charges.** — Jeopardy attached with respect to charges dismissed by the State at the close of its evidence. State v. Poston, 162 N.C. App. 642, 591 S.E.2d 898, 2004 N.C. App. LEXIS 260 (2004).

**It is an essential of jurisdiction that a criminal offense shall be sufficiently charged** in a warrant or an indictment. State v. Barnes, 253 N.C. 711, 117 S.E.2d 849 (1961).

**A valid indictment is essential** to the jurisdiction of the court in a criminal case. State v. Crabtree, 286 N.C. 541, 212 S.E.2d 103 (1975).

**Indictment Must Allege All Essential Elements of Offense.** — An indictment, whether at common law or under a statute, to be good must allege lucidly and accurately all the essential elements of the offense sought to be charged. State v. Barnes, 253 N.C. 711, 117 S.E.2d 849 (1961); State v. Sutton, 14 N.C. App. 422, 188 S.E.2d 596 (1972).

An indictment charging a statutory offense must allege all of the essential elements of the offense. State v. Crabtree, 286 N.C. 541, 212 S.E.2d 103 (1975).

**And Be Sufficient to Protect Defendant Against Subsequent Prosecution.** — The allegations in a bill of indictment must particularize the crime charged and be sufficiently explicit to protect defendant against a subsequent prosecution for the same offense. State v. Barnes, 253 N.C. 711, 117 S.E.2d 849 (1961).

**But Special Form or Particular Words Are Not Required.** — This section does not require that the accused be informed of the charge against him in any special form or particular words, except that it must be by presentment or indictment. State v. Gibson, 169 N.C. 318, 85 S.E. 7 (1915); State v. Carpenter, 173 N.C. 767, 92 S.E. 373 (1917).

Since no conclusion could be reached by reading the indictment other than that defendant was in custody at the time he allegedly committed malicious conduct by a prisoner, the trial court had jurisdiction over his case, as the State adequately alleged the offense such that defendant was notified of the offense against which he was called to defend. State v. Artis, 174 N.C. App. 668, 622 S.E.2d 204, 2005 N.C. App. LEXIS 2610 (2005), cert. denied, — N.C. —, 630 S.E.2d 188 (2006).

**An indictment that charges in a plain, intelligible and explicit manner** the criminal offense the accused is put to answer affords the protection guaranteed by this section and N.C. Const., Art. I, § 22. State v. Helms, 247 N.C. 740, 102 S.E.2d 241 (1958).

If an indictment charges the offense in a plain, intelligible and explicit manner and contains averments sufficient to enable the court to proceed to judgment, and to bar a subsequent prosecution for the same offense, it is sufficient. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

**Sufficiency of Charging Offense in Words of Statute.** — An indictment for a statutory offense is sufficient as a general rule when it charges the offense in the language of the statute. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

While it is a general rule prevailing in this State that an indictment for a statutory offense is sufficient if the offense be charged in the words of the statute, the rule is inapplicable where the words of the statute do not in themselves inform the defendant of the specific offense of which he is accused so as to enable him to prepare his defense or plead his conviction or acquittal as a bar to further prosecution for the same offense, as where the statute characterizes the offense in mere general or generic terms, or does not sufficiently define the crime or set forth all its essential elements. In such situation, the statutory words must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the defendant and the court as to the offense intended to be charged. State v. Barnes, 253 N.C. 711, 117 S.E.2d 849 (1961).

The court rejected the defendant's argument that because the indictment failed to allege two essential elements of first degree murder, i.e., premeditation and deliberation, his conviction of first degree murder based thereon violated Article I, §§ 19, 22 and 23 of the North Carolina Constitution. The court found that the defendant had adequate notice of the charge against him, as North Carolina has for nearly 100 years authorized the use of the short form murder indictment as sufficient to allege the elements of premeditation and deliberation, and the jury was properly required to find those elements beyond a reasonable doubt. State v. Holder, 138 N.C. App. 89, 530 S.E.2d 562, 2000 N.C. App. LEXIS 552 (2000).

**Relationship of Dates of Alleged Offenses Listed in Indictment to Double Jeopardy.** — If, as the general rule provides, the date of an offense is not material, then the critical issue is whether there is an indictment for each alleged offense; when there is a corresponding number of indictments and offenses, then double jeopardy would only be a concern if the dates on the indictment are material. State v. Poston, 162 N.C. App. 642, 591 S.E.2d 898, 2004 N.C. App. LEXIS 260 (2004).

**Relationship of Dates of Alleged Offenses Listed in Indictment to Double Jeopardy.** — Absent evidence of the same number of incidents as indictments, time would have a most important effect upon the punishment, because a defendant will have received two consecutive terms of imprisonment for identical offenses based upon the same act, in violation of defendant's Fifth Amendment right not to be twice tried for the same offense. State v. Poston, 162 N.C. App. 642, 591 S.E.2d 898, 2004 N.C. App. LEXIS 260 (2004).

**The time fixed in a bill of indictment** usually is not an essential fact, and generally the State may prove that the crime was committed on another date; but when the State fixes the date in the indictment and the defendant presents evidence of an alibi relating to that date, time becomes of the essence, and the State may not, after the defendant has presented his alibi evidence and rested his case, introduce evidence tending to show the defendant's commission of the crime charged on another date. To permit a conviction on such evidence would violate rights guaranteed by this section. State v. Vincent, 35 N.C. App. 369, 241 S.E.2d 390 (1978).

**Testing Sufficiency of Warrant or Indictment.** — A motion to quash is a proper method of testing the sufficiency of a warrant or an indictment to charge a criminal offense. State v. Barnes, 253 N.C. 711, 117 S.E.2d 849 (1961).

**Form of Bill for Homicide.** — This section and G.S. 15A-924(a)(5) did not specifically repeal G.S. 15-144, relating to essentials of a bill for homicide, nor did they repeal it by implication. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985), aff'd, 95 N.C. 572, 383 S.E.2d 224 (1989).

**Statute which established a form for a bill of indictment for perjury** and enacted in express terms that this form would be sufficient was sufficient to apprise the defendant with reasonable certainty of the nature of the crime of which he stood charged. State v. Harris, 145 N.C. 456, 59 S.E. 115 (1907).

**Short-form murder indictment** which did not allege premeditation nor the elements of felony murder was held not defective. State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988).

Court of appeals rejected defendant's argument that the trial court violated his rights under U.S. Const., Amends. V, VI, and XIV and N.C. Const., Art. I, §§ 19, 22, and 23, by entering a judgment convicting him of first degree rape and first degree sex offense on the basis of a short-form indictment. State v. Randle, 167 N.C. App. 547, 605 S.E.2d 692, 2004 N.C. App. LEXIS 2381 (2004).

Short-form murder indictment is constitutional. State v. Alvarez, 168 N.C. App. 487, 608 S.E.2d 371, 2005 N.C. App. LEXIS 342 (2005).

**Aggravating Circumstances of Capital Offense Need Not be Alleged.** — The defendant's murder indictment complied with the requirements of this section and did not violate his constitutional rights; because defendant had notice that he was charged with first degree murder and the elements thereof, as well as his eligibility for the death penalty, the State was not required to allege the supporting aggravating circumstances. State v. Holman, 353 N.C. 174, 540 S.E.2d 18, 2000 N.C. LEXIS 909 (2000), cert. denied, 534 U.S. 910, 122 S. Ct. 250, 151 L. Ed. 2d 181 (2001), cert. denied, — N.C. —, 619 S.E.2d 854 (2005).

State-court murder indictments are not required to allege the aggravating circumstances to be presented against capital defendants. State v. Hunt, 357 N.C. 257, 582 S.E.2d 593, 2003 N.C. LEXIS 746 (2003), cert. denied, 539 U.S. 985, 124 S. Ct. 44, 156 L. Ed. 2d 702 (2003).

**A warrant or indictment charging dissemination or possession of obscenity** should at least so describe the alleged obscene matter or pictures as to render them capable of identification. State v. Barnes, 253 N.C. 711, 117 S.E.2d 849 (1961).

**An indictment which failed to show the causal relation between alleged false pretense and deceit,** would be held not to inform defendant of the crime charged against him. State v. Whedbee, 152 N.C. 770, 67 S.E. 60, 27 L.R.A. (n.s.) 363 (1910).

**Indictment for Larceny and Receiving Stolen Goods.** — Defendant had a constitutional right to have a bill of indictment for larceny and receiving stolen goods state the kind of property he was alleged to have taken or received, so that he could know precisely what he was called upon to meet, in order to have a fair and reasonable opportunity to prepare his defense, and so that, in the event of a conviction, the record might show with accuracy the exact offense of which he was convicted. The use of the embrasive word "meat" in the bill of indictment deprived the defendant of this substantial constitutional right. State v. Nugent, 243 N.C. 100, 89 S.E.2d 781 (1955).

In an indictment for larceny, the description "automobile parts . . . of one Furches Motor Company" sufficiently identified the property alleged to have been stolen, as the description identified the type of parts and the owner from whom they were taken. State v. Foster, 10 N.C. App. 141, 177 S.E.2d 756 (1970).

In a prosecution for larceny, the property alleged to have been taken should be described by the name usually applied to it in its condition at that time, and, if possible, the number, kind, quality, and other distinguishing features. State v. Hartley, 39 N.C. App. 70, 249 S.E.2d 453 (1978), cert. denied, 296 N.C. 738, 254 S.E.2d 179 (1979).

**Where warrant which charged defendant with breaking and entering** for the purpose of threatening to kill charged only a misdemeanor, and where defendant received his first notice that he was charged with breaking and entering with intent to commit larceny when the indictment was returned on the day of the trial, defendant was forced into a trial for which he was not allowed sufficient time to prepare his defense. State v. Smathers, 287 N.C. 226, 214 S.E.2d 112 (1975).

**Kidnapping.** — An indictment charging that defendant "unlawfully, did feloniously and forcibly kidnap" a person named was not defective or violative of N.C. Const., Art. I, § 22 or this section for failure to charge additionally that the victim was forcibly carried away against her will. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

**Charge to Jury Held to Violate Section.** — A charge to the jury which virtually put the defendant upon trial for an additional offense to that named in the bill, namely, conspiring with others than those alleged, violated the provisions of this section that "in all criminal prosecutions every man has the right to be informed of the accusation against him." State v. Mickey, 207 N.C. 608, 178 S.E. 220 (1935).

**Indictment Properly Dismissed.** — In defendant's conviction for robbery with firearm, the trial court properly denied defendant's motion to dismiss the indictment based on the State's withholding of evidence favorable to defendant, as any possible violation of defendant's rights was completely cured and without prejudice. State v. Geddie, — N.C. App. —, — S.E.2d —, 2003 N.C. App. LEXIS 85 (Feb. 18, 2003).

**Appeal to Superior Court.** — The superior court has no jurisdiction to try an accused for a specific misdemeanor on the warrant of an inferior court unless he is first tried and convicted for such misdemeanor in the inferior court and appeals to the superior court from the sentence pronounced against him by the inferior court on his conviction for such misdemeanor. State v. Guffey, 283 N.C. 94, 194 S.E.2d 827 (1973).

## III. RIGHT OF CONFRONTATION.

### A. In General.

**The word "confront"** does not simply secure to the accused the privilege of examining witnesses in his behalf, but is an affirmance of the rule of the common law that in trials by jury the witness must be present before the jury and accused, so that he may be confronted; that is, put face to face. And this, of course, includes the right of cross-examination. State v. Moss, 47 N.C. 66 (1854); State v. Thomas, 64 N.C. 74 (1870); State v. Harris, 181 N.C. 600, 107 S.E. 466 (1921); State v. Maynard, 184 N.C. 653, 113 S.E. 682 (1922); State v. Snipes, 185 N.C. 743, 117 S.E. 500 (1923); State v. Dixon, 185 N.C. 727, 119 S.E. 170 (1923); State v. Hightower, 187 N.C. 300, 121 S.E. 616 (1924); State v. Hartsfield, 188 N.C. 357, 124 S.E. 629 (1924); State v. Breece, 206 N.C. 92, 173 S.E. 9 (1934).

The word "confront" secures to the accused the right to have his witnesses in court and to examine them in his behalf. It further secures to the accused a fair opportunity to prepare and present his defense, which right must be afforded him not only in form but in substance. State v. Hackney, 240 N.C. 230, 81 S.E.2d 778 (1954); State v. Graves, 251 N.C. 550, 112 S.E.2d 85 (1960).

**The right of confrontation is an absolute right** rather than a privilege, and it must be afforded an accused not only in form but in substance. State v. Watson, 281 N.C. 221, 188 S.E.2d 289, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972).

The defendant is entitled to a full and fair cross-examination upon the subject of the witness' examination-in-chief, and this is an absolute right rather than a privilege. State v. Bumper, 275 N.C. 670, 170 S.E.2d 457 (1969).

**But the right to compulsory process is not absolute,** and a state may require that a defendant requesting such process at state expense establish some colorable need for the person to be summoned, lest the right be abused by those who would make frivolous requests. State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978).

**Actual Presence Required.** — The essential characteristic of defendant's constitutional right to presence is just that, his actual presence during trial. State v. Buchanan, 330 N.C. 202, 410 S.E.2d 832 (1991).

Under the N.C. State Constitution, defendant's actual presence is required throughout his trial, not just at particularly important junctures. State v. Buchanan, 330 N.C. 202, 410 S.E.2d 832 (1991).

Where an in-chambers conference occurred between the trial judge and counsel without defendant, defendant's constitutional right to be present at every stage of his capital trial was violated. State v. Meyer, 345 N.C. 619, 481 S.E.2d 649 (1997).

Where in-chambers discussion, which occurred outside of defendant's presence, was not included in the record, the court did not know the substance of the in-chambers conference held with the attorneys in defendant's absence; consequently, the court was unable to determine whether the error committed was harmless beyond a reasonable doubt and ordered a new sentencing proceeding. State v. Meyer, 345 N.C. 619, 481 S.E.2d 649 (1997).

**Certain Violations of Right May Be Harmless.** — Notwithstanding an accused's right to be present, at all stages of trial, certain violations of this right may be harmless if such appears from the record. State v. Buchanan, 330 N.C. 202, 410 S.E.2d 832 (1991).

**Bench Conferences Not Violative of Right to Be Present.** — A defendant's state constitutional right to be present at all stages of his capital trial is not violated when, with defendant present in the courtroom, the trial court conducts bench conferences, even though unrecorded, with counsel for both parties. State v. Buchanan, 330 N.C. 202, 410 S.E.2d 832 (1991).

A defendant's constitutional right to be present at all stages of his capital trial is not violated when the trial court conducts a bench conference among the lawyers in open court where defendant is present in the courtroom. State v. Robinson, 346 N.C. 586, 488 S.E.2d 174, 1997 N.C. LEXIS 478 (1997), cert. denied, — N.C. —, 502 S.E.2d 611 (1998).

Defendant's constitutional right to be present at all stages of his capital trial is not violated when, with defendant present in the courtroom, the trial court conducts bench conferences, even though unrecorded, with counsel for both parties. State v. Call, 349 N.C. 382, 508 S.E.2d 496 (1998).

**Chambers Conference.** — Although it was error to conduct a chambers conference with counsel for the state and counsel for defendant in the defendants absence, the error did not mandate automatic reversal. State v. Addison, 128 N.C. App. 741, 496 S.E.2d 412 (1998).

State carried the burden of demonstrating that error was harmless beyond a reasonable doubt where the court conducted a chambers conference with counsel for the state and counsel for defendant in the defendants absence. State v. Addison, 128 N.C. App. 741, 496 S.E.2d 412 (1998).

**Bailiff's Communication with Jurors.** — Defendant who was charged with murder and armed robbery was not denied his rights under the Confrontation Clause of the North Carolina Constitution, N.C. Const., Art. I, § 23, because the trial court told the bailiff to remind that jurors that they were not to discuss the case with anyone while the jury was not deliberating, and the bailiff gave that instruction while defendant was not present. State v. Coleman, 161 N.C. App. 224, 587 S.E.2d 889, 2003 N.C. App. LEXIS 2039 (2003).

**Right To Be Present Not Violated When Jurors Excused During Bench Conferences.** — Defendant's right to be present during all stages of his trial pursuant to this section was not violated when the trial court excused jurors during bench conferences State v. Neal, 346 N.C. 608, 487 S.E.2d 734 (1997), cert. denied, 522 U.S. 1125, 118 S. Ct. 1072, 140 L. Ed. 2d 131 (1998).

**If, however, the subject matter of the conference implicates the defendant's confrontation rights,** or is such that the defendant's presence would have a reasonably substantial relation to this opportunity to defend, the defendant would have a constitutional right to be present. State v. Buchanan, 330 N.C. 202, 410 S.E.2d 832 (1991).

**Defendant's absence during certain conferences and discussions in his capital trial did not prejudice defendant in any way** and was harmless beyond a reasonable doubt, where defendant's counsel was present, as was the court reporter, who recorded and transcribed the complete proceedings, the subjects of the conferences and discussions were either points of law, procedural matters, or administrative matters, none of which involved communication with the jury, and no witness gave testimony concerning defendant's guilt. State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991).

**Right to Be Present at Every Stage.** — This section is the sole source of the criminal defendant's nonwaivable state right to be present at every stage of his capital trial and of the corollary duty imposed on the trial court to insure his presence. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

The confrontation clause of the Constitution of North Carolina guarantees the right of the defendant to be present at every stage of the trial. This state constitutional protection afforded to the defendant imposes on the trial court the affirmative duty to insure the defendant's presence at every stage of a capital trial. The defendant's right to be present at every stage of the trial ought to be kept forever sacred and inviolate. In fact, the defendant's right to be present at every stage of his capital trial is not waivable. State v. Moss, 332 N.C. 65, 418 S.E.2d 213 (1992).

**Right Does Not Apply to Physical Evidence.** — This section only pertains to witnesses, and does not create a constitutional right of confrontation to physical evidence. State v. Alston, 91 N.C. App. 707, 373 S.E.2d 306 (1988).

**Right Includes Opportunity to Face Accusers and Witnesses with Other Testimony.** — Defendants have a constitutional right of confrontation, which cannot lawfully be taken from them, and this includes the right of a fair opportunity to face the accusers and witnesses with other testimony. State v. Garner, 203 N.C. 361, 166 S.E. 180 (1932).

A defendant has the constitutional right, in a criminal prosecution, to confront his accusers with other testimony. State v. Hill, 9 N.C. App. 279, 176 S.E.2d 41 (1970), rev'd on other grounds, 277 N.C. 547, 178 S.E.2d 462 (1971).

The right to face one's accusers and witnesses with other testimony is guaranteed by U.S. Const., Amend. VI, which is made applicable to the states by U.S. Const., Amend. XIV, and by this section and N.C. Const., Art. I, § 19. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972); State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976).

**And the Right to Cross-Examine.** — The right of a defendant to confront his accusers includes the right to cross-examine them on any subject touched on in their examination-in-chief, and a witness testifying to facts incriminating defendant on his examination-in-chief may not deprive defendant of his right to cross-examine him on the ground that answers to questions asked on cross-examination might tend to incriminate the witness. State v. Perry, 210 N.C. 796, 188 S.E. 639 (1936).

The right to confront affirms the common-law rule that in criminal trials by jury the witness must be present and subject to cross-examination under oath. State v. Bumper, 275 N.C. 670, 170 S.E.2d 457 (1969).

A party to either a civil or criminal proceeding may elicit from an opposing witness on cross-examination particular facts having a logical tendency to show that the witness is biased against him, hostile to his cause, or interested adversely to him in the outcome of the litigation. State v. White, 286 N.C. 395, 211 S.E.2d 445 (1975).

One of the most jealously guarded rights in the administration of justice is that of cross-examining an adversary's witnesses. State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976); State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

**Absence During Part of Prosecution's Presentation.** — Nothing in the record showed that defendant was prejudiced by his absence during part of the presentation of the prosecution's evidence in defendant's capital case where all proceedings took place in open court; everything that took place was reflected in the record, and the record showed that defense counsel were in court and participated throughout defendant's absence to protect his interest, the trial judge told counsel they could confer with defendant as to the possibility of his return at any time, and the trial judge undertook to perform his duty to assure defendant's presence. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

**Right Not Violated When Court Conducted Bench Conferences with Counsel for Both Parties.** — A defendant's state constitutional right to be present at all stages of his capital trial was not violated when the trial court conducted bench conferences with counsel for both parties while the defendant was present in the courtroom. State v. Upchurch, 332 N.C. 439, 421 S.E.2d 577 (1992).

Where the trial court conducted numerous bench conferences with counsel in which defendant did not participate, nothing in the record indicated that defendant was not present in the courtroom during their discussions, the trial court received no evidence during any of these bench conferences, and most of the discussion concerned mechanical aspects of the proceedings, including lunch breaks, presentation of proposed instruction by the trial court to counsel for their comments, and argument of technical motions or objections out of the jury's hearing; therefore, because defendant was represented by counsel during each of these conferences, nothing in the record demonstrates how defendant's presence would have served any useful purpose, nor does defendant demonstrate how the conferences impinged upon his opportunity to defend and failed to demonstrate any violation of his constitutional protections. State v. Bacon, 337 N.C. 66, 446 S.E.2d 542 (1994), cert. denied, 513 U.S. 1159, 115 S. Ct. 1120, 130 L. Ed. 2d 1083 (1995).

**Trial court's unrecorded private communications with three prospective jurors,** perhaps violative of defendant's nonwaivable constitutional right to be present at every stage of his trial, were harmless error beyond a reasonable doubt because the record adequately revealed the substance of those communications and the jurors were properly excused. State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

**Right Violated by Court's Private Bench Conferences With Jurors.** — The fact that the jury recommended and the trial court entered a sentence of life imprisonment did not change the capital nature of that trial or his status as a capital defendant in that trial. Therefore, the unwaiveable requirement of his presence applied at every stage of his trial and was violated by the trial court's private bench conferences with prospective jurors. State v. Johnston, 331 N.C. 680, 417 S.E.2d 228 (1992).

Jury selection is a stage of a capital trial at which the defendant must be present. The trial court erred by conducting bench conferences with prospective jurors out of the hearing of the defendant and his counsel. Therefore, the Supreme Court had to order a new trial. State v. Moss, 332 N.C. 65, 418 S.E.2d 213 (1992).

**Exclusion of Defendant from In Camera Hearing with Juror.** — Although it is clearly error for the trial court to communicate with a juror in chambers in the absence of defendant, counsel, or a court reporter, not every violation of a constitutional right is prejudicial. Where the record of an in camera hearing attended only by a juror, the trial judge, counsel, and a court reporter reflected the benign substance of the conversation, the juror's growing unease with her ability to impose the death penalty, and where after the hearing the juror was promptly and properly removed for cause, obviating the possibility that anything said to her privately by the trial court might infect the jury as a whole, this action was harmless beyond a reasonable doubt. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), sentence vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990), in light of Calvert v. Peebles, 82 N.C. 334 (1880).

It was error for the trial court to exclude the defendants, their counsel, and the court reporter from its private conversations with prospective jurors prior to excusing those jurors. State v. Johnston, 331 N.C. 680, 417 S.E.2d 228 (1992).

Although it is error for the trial court to conduct a chambers conference with counsel for the state and counsel for defendant in defendant's absence, where defendant was present during the questioning of a juror and was fully apprised of the facts underlying the reasons for the juror's excusal, defendant had full opportunity to be heard and to lodge any objection he might have. State v. Daniels, 337 N.C. 243, 446 S.E.2d 298 (1994), cert. denied, 513 U.S. 1135, 115 S. Ct. 953, 130 L. Ed. 2d 895 (1995).

**Judge's Ex Parte Communications with Jury Before Verdict Rendered.** — Where, during the course of the trial, the presiding trial judge engaged in an ex parte communication with the jury, and prior to reconvening court, the judge entered the jury room where the jurors had gathered and was alone with the jurors, this conduct on the part of the presiding judge violated the defendant's rights under N.C. Const., Art. I, § 23 and this section, and U.S. Const., Amends. VI and XIV. State v. Callahan, 102 N.C. App. 344, 401 S.E.2d 793 (1991).

Assuming arguendo that judge's chance meeting in the corridor with jurors during a recess at which time judge and jurors discussed, inter alia, cameras in the courtroom and selection of a foreman, did constitute a "stage" of a capital proceeding, the error, if any, was harmless beyond a reasonable doubt where there existed in the record a reconstruction of the ex parte conversations. State v. Hudson, 331 N.C. 122, 415 S.E.2d 732 (1992), cert. denied, 506 U.S. 1055, 113 S. Ct. 983, 122 L. Ed. 2d 136, rehearing denied, 507 U.S. 967, 113 S. Ct. 1404, 122 L. Ed. 2d 776 (1993).

Where the court found two prospective jurors were ineligible to serve due to their recent service as prospective jurors, and third prospective juror, who had arranged to be a pallbearer at a funeral, was deferred for a "manifestly unobjectionable" reason, the error of the judge in communicating ex parte with the prospective jurors was harmless beyond a reasonable doubt. State v. Adams, 335 N.C. 401, 439 S.E.2d 760 (1994).

**Ex parte "communication" between judge and jury,** wherein the trial judge routinely inquired about any problems individual jurors might have that he needed to know about, did not violate defendant's state and federal constitutional rights to be present during the proceedings against him, where the trial judge's statement indicated that no such problems were either expressed by the jurors or discussed with them by the trial judge. State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), sentence vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990).

Where there was a sufficient record of the substance of ex parte communications between the judge and both prosecutor and defense counsel and defendant had opportunity to challenge the ruling in open court when it was announced in his presence, defendant was not prejudiced by the communications. State v. Daniels, 337 N.C. 243, 446 S.E.2d 298 (1994), cert. denied, 513 U.S. 1135, 115 S. Ct. 953, 130 L. Ed. 2d 895 (1995).

**Private Discussion Between Judge and Jurors Who Had Been Dismissed.** — Defendant's State and federal constitutional rights to be present at all stages of his trial were not violated when the trial court talked privately with jurors, since the transcript showed that the trial judge sent all those who still were prospective jurors home and indicated that he was going to talk only to those whom he had dismissed from jury service. State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), sentence vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990).

No violation of defendant's constitutional right to be present at every stage of his trial, pursuant to this section, occurred on account of the trial court's alleged ex parte communication with, and the excusing of, a juror. The trial court's memorialization of the private communication between the prospective juror, the clerk and the trial court, which was neither questioned nor objected to by defendant or his counsel, disclosed that the prospective juror was excused for a valid reason and that the communication was harmless beyond a reasonable doubt. State v. Holder, 138 N.C. App. 89, 530 S.E.2d 562, 2000 N.C. App. LEXIS 552 (2000).

**Bailiff's Communication with Prospective Jurors.** — Where the bailiff was ordered to engage in unrecorded communications with prospective jurors and the trial jury, the actions of the clerk involved the clerk's administrative duties of calling the jury roll and explaining to the jurors what time they needed to arrive at court and did not relate to the consideration of defendant's guilt or innocence; therefore, no constitutional violation occurred. State v. Bacon, 337 N.C. 66, 446 S.E.2d 542 (1994), cert. denied, 513 U.S. 1159, 115 S. Ct. 1120, 130 L. Ed. 2d 1083 (1995).

**Scope of cross-examination rests in the discretion of the trial judge,** and his rulings thereon will not be disturbed absent a showing of abuse of discretion. State v. Royal, 300 N.C. 515, 268 S.E.2d 517 (1980); State v. Moses, 52 N.C. App. 412, 279 S.E.2d 59, cert. denied, 303 N.C. 318, 281 S.E.2d 390 (1981).

**And Trial Judge May Limit Cross-Examination for Purposes of Impeachment.** — When cross-examination is made for the purpose of impeaching the credibility of a witness, the method and duration of the cross-examination for these purposes rest largely in the discretion of the trial court, and the trial court may properly exclude such cross-examination when it becomes merely repetitious or argumentative. State v. Bumper, 275 N.C. 670, 170 S.E.2d 457 (1969).

**To convict the defendant under the theory of aiding and abetting,** the state has the burden of proving, among other things, that the crimes alleged have in fact been committed. Although it is not required that the principal be convicted, the guilt of the principal must be established beyond a reasonable doubt. This burden cannot be carried by testimony concerning judgments rendered in other trials to which the defendant was not a party and not able to cross-examine witnesses. The admission of such evidence violates defendant's right to confrontation under the Constitution of the United States and the Constitution of North Carolina. State v. Brown, 319 N.C. 361, 354 S.E.2d 225 (1987), overruling State v. Duncan, 28 N.C. 98 (1846) and State v. Chittem, 13 N.C. 49 (1830).

**Undue Repetition, Argumentativeness and Peripheral Inquiry Should Be Banned.** — While it is axiomatic that the cross-examiner ought to be allowed wide latitude, the trial judge has the responsibility to exercise his discretion in such a way that unduly repetitive and argumentative questioning, as well as inquiry into matters which are only peripherally relevant, are banned. State v. Royal, 300 N.C. 515, 268 S.E.2d 517 (1980).

**Right to Prepare and Present Defense Guaranteed.** — The constitutional right of a defendant in a criminal prosecution to confront his accusers and adverse witnesses with other testimony, as provided by this section, includes the right to a fair opportunity to prepare and present his defenses, which right must be accorded him not only in form, but in substance as well. State v. Whitfield, 206 N.C. 696, 175 S.E. 93, cert. denied, 293 U.S. 556, 55 S. Ct. 114, 79 L. Ed. 658 (1934); State v. Utley, 223 N.C. 39, 25 S.E.2d 195 (1943); State v. Gibson, 229 N.C. 497, 50 S.E.2d 520 (1949), discussed in 27 N.C.L. Rev. 544 (1949); State v. Speller, 230 N.C. 345, 53 S.E.2d 294 (1949); State v. Whisnant, 271 N.C. 736, 157 S.E.2d 545 (1967).

The right of confrontation carries with it not only the right to face one's accusers and witnesses with other testimony, but also the opportunity fairly to present one's defense. State v. Lane, 258 N.C. 349, 128 S.E.2d 389 (1962).

Due process requires that every defendant be allowed a reasonable time and opportunity to investigate and produce competent evidence, if he can, in defense of the crime with which he stands charged and to confront his accusers with other testimony. State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970); State v. Thomas, 294 N.C. 105, 240 S.E.2d 426 (1978).

Every defendant is entitled under the Constitution to have a reasonable opportunity to prepare his defense. This includes the right to consult with his counsel and to have a fair and reasonable opportunity, in the light of all attendant circumstances, to investigate, to prepare, as well as to present his defense. State v. Hill, 9 N.C. App. 279, 176 S.E.2d 41 (1970), rev'd on other grounds, 277 N.C. 547, 178 S.E.2d 462 (1971).

It is implicit in the guarantees of assistance of counsel and confrontation of one's accusers and witnesses that an accused have a reasonable time to investigate, prepare and present his defense. However, no set length of time for investigation, preparation and presentation is required, and whether defendant is denied due process must be determined upon the basis of the circumstances of each case. State v. Vick, 287 N.C. 37, 213 S.E.2d 335, cert. dismissed, 423 U.S. 918, 96 S. Ct. 228, 46 L. Ed. 2d 367 (1975); State v. Harris, 290 N.C. 681, 228 S.E.2d 437 (1976).

The right of a defendant charged with a criminal offense to present to the jury his version of the facts is a fundamental element of due process of law, guaranteed by the federal and state constitutions. State v. Locklear, 349 N.C. 118, 505 S.E.2d 277 (1998), cert. denied, 526 U.S. 1075, 119 S. Ct. 1475, 143 L. Ed. 2d 559 (1999).

**When Right Not Denied by Refusing Continuance.** — The denial of a continuance is not prejudicial error where the record fails to show that it would have enabled defendant and his counsel to obtain additional evidence or otherwise present a stronger defense. State v. Gibson, 229 N.C. 497, 50 S.E.2d 520 (1948).

Trial court did not err in denying the defendant's motions for a continuance before trial and during trial as the defendant failed to prove he would acquire proof of his innocence because of the continuance. State v. Marecek, 152 N.C. App. 479, 568 S.E.2d 237, 2002 N.C. App. LEXIS 967 (2002).

**When Motion for Continuance Presents Question of Law.** — When a motion for a continuance in a criminal case is based on a right guaranteed by U.S. Const., Amend. XIV, this section and N.C. Const., Art. I, § 19, the question presented is one of law and not of discretion, and the decision of the court below is reviewable. State v. Farrell, 223 N.C. 321, 26 S.E.2d 322 (1943); State v. Lane, 258 N.C. 349, 128 S.E.2d 389 (1962); State v. Atkinson, 7 N.C. App. 355, 172 S.E.2d 249 (1970).

A motion for continuance is addressed to the sound discretion of the trial judge and his ruling thereon is not subject to review on appeal, except in a case of manifest abuse; however, when the motion is based on a right guaranteed by the federal and State Constitutions, the question presented is one of law and the order of the court is reviewable. State v. Phillip, 261 N.C. 263, 134 S.E.2d 386, cert. denied, 377 U.S. 1003, 84 S. Ct. 1939, 12 L. Ed. 2d 1052, rehearing denied, 379 U.S. 874, 85 S. Ct. 28, 13 L. Ed. 2d 83 (1964); State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976); State v. Harris, 290 N.C. 681, 228 S.E.2d 437 (1976); State v. Beeson, 292 N.C. 602, 234 S.E.2d 595 (1977).

While a motion for continuance is ordinarily addressed to the sound discretion of the trial court, and the trial court's ruling is not subject to review absent abuse of discretion, if the motion is based on the constitutional right of confrontation, in that the refusal of the motion denied defendant a reasonable time within which to prepare and present his defense, the decision of the trial court is reviewable as a question of law. State v. Abernathy, 295 N.C. 147, 244 S.E.2d 373 (1978); State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981), overruled on other grounds, 314 N.C. 432, 333 S.E.2d 743 (1985).

**Presence of Witnesses Required.** — The right of confrontation confirms the common-law rule that, in criminal trials, the witnesses must be present and subject to cross-examination. State v. Watson, 281 N.C. 221, 188 S.E.2d 289, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972).

**But Not in All Cases.** — The right guaranteed by this section does not mean that never under any circumstances shall a criminal charge be prosecuted except by the presence of living witnesses. State v. Dowdy, 145 N.C. 432, 58 S.E. 1002 (1907).

**A good faith effort to obtain witness's presence must be shown to justify use of his prior testimony.** State v. Biggerstaff, 16 N.C. App. 140, 191 S.E.2d 426 (1972).

**Where Child Is Victim.** — When considering admission of a child victim's statement to a social worker when the child is found to be incompetent as a witness, the confrontation clause and G.S. 8C-1, Rule 803(24) require a case-by-case examination of the facts. State v. Deanes, 323 N.C. 508, 374 S.E.2d 249 (1988), cert. denied, 490 U.S. 1101, 109 S. Ct. 2455, 104 L. Ed. 2d 1009 (1989).

**Introduction of Transcribed Testimony.** — The constitutional right of confrontation is not denied an accused by the introduction at a subsequent trial of the transcribed testimony given at a former trial of the same action by a witness who has since died, become insane, left the State permanently or for an indefinite absence, become incapacitated to testify in court as a result of a permanent or indefinite illness, or absented himself by procurement of, or connivance with, the accused. The accuracy of the transcription must be attested and it must appear that the defendant had a reasonable opportunity to cross-examine the witness. State v. Prince, 270 N.C. 769, 154 S.E.2d 897 (1967); State v. Biggerstaff, 16 N.C. App. 140, 191 S.E.2d 426 (1972).

**Duly Authenticated Copy of Record.** — While this section gives to the accused the right to confront his accusers, such does not apply when the facts, from their very nature, can only be proved by a duly authenticated copy of a record. State v. Dowdy, 145 N.C. 432, 58 S.E. 1002 (1907).

**Statements falling within an exception to the general prohibition against hearsay** may be admitted into evidence without violating a defendant's right to confrontation, if the evidence is reliable. State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991).

Where hearsay proffered by the prosecution comes within a firmly rooted exception to the hearsay rule, this constitutional provision was not violated, even though no particularized showing was made as to the necessity for using such hearsay or as to its reliability or trustworthiness. State v. Jackson, 348 N.C. 644, 503 S.E.2d 101 (1998).

**Use of Hearsay in Criminal Trial.** — A prosecutor is prohibited by U.S. Const., Amend. VI and this section from introducing any hearsay evidence in a criminal trial unless two requirements are met. The prosecution must show both the necessity for using the hearsay testimony and the inherent trustworthiness of the original declaration. State v. Gregory, 78 N.C. App. 565, 338 S.E.2d 110 (1985), cert. denied and appeal dismissed, 316 N.C. 382, 342 S.E.2d 901 (1986).

**Use of Hearsay in Sentencing Proceedings.** — Trial court did not err in admitting hearsay evidence of an alleged bribe offered to the witness by defendant at defendant's sentencing; further, the use of this hearsay evidence did not violate the Confrontation Clause. State v. Sings, 182 N.C. App. 162, 641 S.E.2d 370, 2007 N.C. App. LEXIS 486 (2007), cert. denied, appeal dismissed, 361 N.C. 574, 2007 N.C. LEXIS 885 (2007).

**There is a two-prong constitutional test for the admission of hearsay under the confrontation clause,** i.e., necessity and trustworthiness. State v. Jackson, 126 N.C. App. 129, 484 S.E.2d 405 (1997), rev'd on other grounds, 348 N.C. 644, 503 S.E.2d 101 (1998).

The prosecution in a criminal trial must, as prerequisite to the introduction of hearsay evidence, show the necessity for using the hearsay testimony and establish the inherent trustworthiness of the original declaration. State v. Jackson, 126 N.C. App. 129, 484 S.E.2d 405 (1997), rev'd on other grounds, 348 N.C. 644, 503 S.E.2d 101 (1998).

**In-Court Identification.** — Where the evidence shows that witness had a good and sufficient opportunity to observe a defendant at the time the offense was being committed, and testifies that his in-court identification is based on his observation made at that time, the test of "clear and convincing evidence" is met. State v. Jackson, 24 N.C. App. 394, 210 S.E.2d 876, rev'd on other grounds, 287 N.C. 470, 215 S.E.2d 123 (1975).

If there is objection to an in-court identification by a witness who participated in an illegal lineup procedure, such evidence must be excluded unless it be determined on voir dire that the in-court identification is of independent origin and therefore not tainted by the illegal lineup. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

**Out-of-Court Declarations of Codefendant.** — Even when the right of confrontation is afforded to a defendant implicated in the out-of-court declarations of a codefendant, the prejudicial impact of testimony of the codefendant's declarations must be evaluated in the light of the competent evidence admitted against the nondeclarant defendant. The gap between the impact of evidence which is not admitted against but incriminates the nondeclarant and of competent evidence of minimal probative value admitted against him in a given case may be so great as to constitute a denial of due process. State v. Jones, 280 N.C. 322, 185 S.E.2d 858 (1972).

**Admission of Codefendant's Confession Inculpating Accused.** — An accused's constitutional right of cross-examination is violated at his joint trial with a codefendant who does not testify, when the court admits the codefendant's confession inculpating the accused, notwithstanding jury instructions that the confession must be disregarded in determining the accused's guilt or innocence. State v. Heard, 285 N.C. 167, 203 S.E.2d 826 (1974).

In joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or declarant, and if such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately, assuming (1) that the confession is inadmissible as to the codefendant, and (2) that the declarant will not take the stand. State v. Heard, 285 N.C. 167, 203 S.E.2d 826 (1974).

**The improper admission of evidence** which violates the right of confrontation does not constitute prejudicial error unless there is a reasonable possibility that such evidence contributed to defendant's conviction. State v. Watson, 281 N.C. 221, 188 S.E.2d 289, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972).

**Prosecution's privilege to withhold the identity of an informant** is founded upon public interest in effective law enforcement and its application turns on the facts of each particular case. State v. Ketchie, 286 N.C. 387, 211 S.E.2d 207 (1975).

**Rights of Person Accused of Offense involving Intoxication.** — When a person is taken into police custody for an offense of which intoxication is an essential element, time is of the essence, as intoxication does not last. Thus, if one accused of driving while intoxicated is to have witnesses for his defense, he must have access to his counsel, friends, relatives, or some disinterested person within a relatively short time after his arrest. The statute says he is entitled to communicate with them immediately, and this is true whether he is arrested at 2:00 a.m. or 2:00 p.m. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Magistrate correctly imposed pretrial release restriction requiring a sober responsible adult to take custody of the defendant pursuant to G.S. 15A-534.2; there was no constitutional violation of defendant's constitutional right to obtain evidence on his own behalf. State v. Bumgarner, 97 N.C. App. 567, 389 S.E.2d 425, cert. denied and appeal dismissed, 326 N.C. 599, 393 S.E.2d 873 (1990).

**A criminal defendant is entitled to offer evidence in defense at trial,** either through her own testimony or through the testimony of other witnesses. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

**Court May Not Forbid Defendant to Offer Detrimental Evidence.** — The trial court is not authorized to forbid a defendant appearing in propria persona to offer evidence, otherwise competent, for the reason that, in the judgment of the court, however sound, such evidence would be detrimental to the defendant. The defendant, whether represented by counsel or appearing in propria persona, is entitled to use his own judgment as to the wisdom of introducing otherwise competent evidence. To deny him this right is to deny him his constitutional rights afforded both by U.S. Const., Amend. VI and this section. State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978).

**Burden of Showing Denial of Right.** — The burden is on defendant to show a clear denial of the right of confrontation. State v. Williams, 51 N.C. App. 613, 277 S.E.2d 546 (1981).

Appellant has the burden of showing not only error but also prejudicial error on appeal of trial judge's refusal to allow cross-examination of a witness. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

**Waiver of Right.** — The accused has the right to insist upon the production of his accusers, but this is a right which may be and is waived by failure to assert it in proper time. The right must be insisted upon in express terms and a general objection to the evidence is not sufficient. State v. Mitchell, 119 N.C. 784, 25 S.E. 783 (1896).

Defendant may waive the general right to be present at his trial by his voluntary and unexplained absence from court. State v. Davis, 186 N.C. App. 242, 650 S.E.2d 612, 2007 N.C. App. LEXIS 2109 (2007).

**Right of Confrontation Is Applicable to Contempt Proceedings.** — The right of confrontation of the witnesses against an accused is applicable to contempt proceedings; thus, an adjudication of contempt against defendant based on the affidavit of the receiver of a corporation was invalid. Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981).

**Right of Confrontation Does Not Apply to Civil Actions.** — The right accorded defendant in a criminal prosecution to confront the witnesses against him does not apply to civil actions. Chesson v. Kieckhefer Container Co., 223 N.C. 378, 26 S.E.2d 904 (1943).

**Proper standard for reversal in reviewing violations under this section of defendant's right to be present at all stages** of his capital trial is the rigorous standard prescribed for review of violations of defendant's right to be present at trial under the federal Constitution. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

The proper standard for reversal in reviewing violations of defendant's state constitutional right to be present at his capital trial is the "harmless beyond a reasonable doubt" standard, and not the standard apparently prescribed in G.S. 15A-1443(a). State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

**Waiver of Rights.** — For a case in which a defendant was held to have waived his rights under this section through his insufficiently explained absence from trial, see State v. Richardson, 330 N.C. 174, 410 S.E.2d 61 (1991).

**Admission of Business Records Did Not Violate Defendant's Right of Confrontation.** — State investigative reports that gave the results of DNA tests incriminating defendant were properly admitted at his trial for murder and rape under G.S. 8C-1, N.C. R. Evid. 803(8), as public records, even though the investigator who made the records did not testify. His supervisor testified, the reports concerned routine matters and recorded only ministerial observations, and defendant's right of confrontation was not violated. State v. Forte, 360 N.C. 427, 629 S.E.2d 137, 2006 N.C. LEXIS 45 (2006).

Admission of nonhearsay raises no Confrontation Clause concerns; testimony regarding an officer's interaction with a detective and a third individual was non-hearsay, and raised no Confrontation Clause concerns, since it was not admitted to prove the truth of the matter asserted, but rather to show how the officer formed a reasonable suspicion that defendant was involved in the robbery at issue, which in turn justified including defendant's photo in a lineup shown to the robbery victim. State v. Alexander, 177 N.C. App. 281, 628 S.E.2d 434, 2006 N.C. App. LEXIS 843 (2006), cert. denied, appeal dismissed, 361 N.C. 358, 644 S.E.2d 357 (2007).

**DNA Tests Incriminating Defendant Properly Admitted.** — State investigative reports that gave the results of DNA tests incriminating defendant were properly admitted at his trial for murder and rape as business records under G.S. 8C-1-803(6), even though the investigator who made the reports did not testify. His supervisor testified, and the reports were not testimonial but were neutral and were not prepared exclusively for trial, and defendant's right of confrontation was not violated. State v. Forte, 360 N.C. 427, 629 S.E.2d 137, 2006 N.C. LEXIS 45 (2006).

### B. Illustrative Cases.

**Depositions taken in the absence of a defendant** could not be read against him. State v. Webb, 2 N.C. 103 (1794).

**The taking of depositions in another state in the absence of the defendant** was assumed by the court to be a "stage" of his capital trial. However, it was clear that all of the testimony of the witnesses during the taking of those depositions tended to support mitigating circumstances. The admission of those depositions into evidence during the capital sentencing proceeding, therefore, could not possibly have harmed the defendant. Accordingly, the State bore its burden of showing that any error as a result was harmless beyond a reasonable doubt. State v. McCollum, 334 N.C. 208, 433 S.E.2d 144 (1993), cert. denied, 512 U.S. 1254, 114 S. Ct. 2784, 129 L. Ed. 2d 895, reh'g denied, 512 U.S. 1278, 115 S. Ct. 26, 129 L. Ed. 2d 924 (1994).

**Denial of pre-trial disclosure of evidence under § 8C-1, Rule 404(b) did not deprive defendant of a fair trial** in violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, §§ 19 and 23 of the North Carolina Constitution. State v. Parker, 2000 N.C. App. LEXIS 1107 (N.C. App. Oct. 3, 2000).

**Improper Materials Published to Jury.** — The defendant's confrontation rights were violated in his murder prosecution, where the prosecutor's notes of an interview with an alleged accomplice as well as a typewritten list of statements attributed to the defendants by an accomplice were inadvertently included among exhibits published to the jury, and neither of the documents had been admitted into evidence and both contained inadmissible material. State v. Hines, 131 N.C. App. 457, 508 S.E.2d 310 (1998).

**Business Records.** — Entries in the course of business, made upon the books of a railroad company by one who was at the time an agent of the company, and was still living, but was absent from the State, were held not competent evidence of the facts therein set forth upon the trial of a third person for crime. State v. Thomas, 64 N.C. 74 (1870).

**Voir Dire.** — The questioning of jurors in defendant's absence erroneously deprived defendant of his right to be present at his trial, but the error was harmless where the court was satisfied beyond a reasonable doubt that defendant's absence during the preliminary questioning of prospective jurors did not result in the rejection of any juror whom defendant was entitled to have on the panel or the seating of any juror whom defendant was entitled to reject either for cause or peremptorily. State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991).

This section gives a criminal defendant the right to be present at every stage of her trial. State v. Callahan, 102 N.C. App. 344, 401 S.E.2d 793 (1991).

A capital murder defendant's constitutional right to be present at every stage of the proceedings was not violated by holding 10 bench conferences outside his presence, where the defendant was present in the courtroom and represented by counsel at each conference, and the only unrecorded conference occurred during voir dire of a prospective juror who was excused for cause because her views would prevent or substantially impair her performance as juror. State v. Bonnett, 348 N.C. 417, 502 S.E.2d 563 (1998), cert. denied, 525 U.S. 1124, 119 S. Ct. 909, 142 L. Ed. 2d 907 (1999).

Defendant waived the right to be present during jury selection where defendant refused to sit quietly in the courtroom; defendant waived the right to raise the issue on appeal where defendant did not object at trial or allege plain error. State v. Miller, 146 N.C. App. 494, 553 S.E.2d 410, 2001 N.C. App. LEXIS 975 (2001).

**No Right to Be Present at Pre-Trial Venue and Venire Negotiations.** — The defendants' federal and state constitutional rights to be present at every stage of their capital trial were not violated when the court ordered the jury drawn from a special venire; although they were not present during out-of-court meetings relating to change of venue or a special venire which took place prior to commencement of defendants' trial, they were present at the hearing on change of venue; furthermore, when the trial court proposed a special venire, both defendants agreed, through counsel. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

**Private Discussions with Prospective Jurors.** — In capital case, trial court's error in having unrecorded private discussions with prospective jurors was harmless beyond a reasonable doubt, as the record did not indicate that any action was taken by the trial judge as a result of these discussions. State v. Scott, 150 N.C. App. 442, 564 S.E.2d 285, 2002 N.C. App. LEXIS 576 (2002), appeal dismissed, cert. denied, 356 N.C. 443, 573 S.E.2d 508 (2002).

**Trial court's action in excusing prospective jurors as a result of its private unrecorded bench conferences** with them violated defendant's state constitutional right to be present at every stage of the trial and violated statutory requirements to make a true, complete and accurate record of the jury selection in a capital trial pursuant to G.S. 15A-1241(a). State v. Smith, 326 N.C. 792, 392 S.E.2d 362 (1990).

**Ex Parte Communication with and Dismissal of Jurors Held Harmless.** — The court's dismissal of six prospective jurors after unrecorded, private bench discussions was harmless where the preliminary questioning of prospective jurors did not result in the rejection of any juror whom defendant was entitled to have on the panel or the seating of any juror whom defendant was entitled to reject either for cause or peremptorily. State v. Cummings, 353 N.C. 281, 543 S.E.2d 844, 2001 N.C. LEXIS 279 (2001).

**Clerk of Court's Communication with Jurors.** — The trial court's direction to the clerk of court to meet privately with jurors about transportation and other logistical matters did not violate the defendants' constitutional rights, although the court omitted a warning to some of the jurors that "no one can answer or would answer any questions about any other aspect of the trial"; absent proof to the contrary, the appellate court assumed that the clerk did not discuss bus routes or travel time or other information which might relate to the crime but limited any discussion to logistics and administrative matters. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

**The Handling And Disclosure of Jury Notes.** — The trial court did not violate defendant's federal or state constitutional rights to presence and effective assistance of counsel by refusing to disclose the full content of notes from the jury, failing to let counsel see or read the notes, or responding without eliciting and considering the informed positions of defendant and his counsel where the court substantially disclosed the content, heard from counsel and responded in open court to each of the communications. State v. Davis, 353 N.C. 1, 539 S.E.2d 243, 2000 N.C. LEXIS 897 (2000), cert. denied, 534 U.S. 839, 122 S. Ct. 95, 151 L. Ed. 2d 55 (2001).

**Absence of Material Witness.** — Defendants' right to confrontation was not denied by refusal of a motion to continue, on the ground of the absence of a material, expert, fingerprint witness, where the prosecuting attorney agreed that he would not offer evidence as to fingerprints. State v. Rising, 223 N.C. 747, 28 S.E.2d 221 (1943).

Trial court did not violate this section by denying a capital murder defendant's motions for a recess or continuance and for a mistrial after an eyewitness could not be located; defendant had the benefit of witness' tape-recorded statements to both the Sheriff's Department and his own counsel, and the evidence indicated the witness had gone into hiding for a long period under circumstances indicating no likelihood of locating him within a reasonable period of time. State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991).

Defendant was not deprived of his constitutional right to present witnesses to confront the evidence against him because his counsel's unsworn statement in support of a continuance, regarding the testimony of a witness whose location had just been discovered the day before, failed to provide detailed proof of a reason for delay and actually supported the State's case. State v. Cody, 135 N.C. App. 722, 522 S.E.2d 777, 1999 N.C. App. LEXIS 1235 (1999).

**Inability of Codefendants to Communicate.** — Findings in post-conviction proceedings that petitioners, although jointly tried, were not allowed to communicate with one another prior to trial, and that their attempts to contact witnesses and friends were unsuccessful, did not support the lower court's conclusion of law that petitioners had not been denied any rights guaranteed to them by this section and N.C. Const., Art. I, § 19 and by U.S. Const., Amend. XIV. State v. Wheeler, 249 N.C. 187, 105 S.E.2d 615 (1958).

**Analysis of Evidence by Expert.** — In defendant's trial on a charge of first degree murder, the trial court erred by denying defendant's motion for a continuance so she could find an expert to analyze the State's expert's conclusion that there was blood splatter on defendant's clothes which suggested that defendant was present when a victim was struck, and the appellate court ordered a new trial because the State did not carry its burden of showing that the trial court's ruling was harmless beyond a reasonable doubt. State v. Barlowe, 157 N.C. App. 249, 578 S.E.2d 660, 2003 N.C. App. LEXIS 536 (2003).

Admission of the results of laboratory tests performed by a non-testifying witness did not violate defendant's right to confrontation, under U.S. Const., Amends. VI and XIV or N.C. Const., Art. I, § 23 because defendant was able to cross-examine a witness qualified as an expert who relied on the test results in giving an expert opinion. State v. Thompson, 188 N.C. App. 102, 654 S.E.2d 814, 2008 N.C. App. LEXIS 82 (2008).

Trial court properly denied defendant's motions to strike the death penalty and to suppress ballistics evidence. Because the State's failure to preserve potentially useful evidence from a crime scene was negligent at worst and there was no suggestion of bad faith, defendant's due process rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and N.C. Const., Art. I, §§ 19 and 23 were not violated. State v. Taylor, 362 N.C. 514, 669 S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

**Inspection of Files of State Bureau of Investigation.** — Where there was no contention that anything in the files of the State Bureau of Investigation was admitted in evidence and the record showed that no member of the Bureau testified during the trial, defendants' contention that they were entitled to an inspection of the files of the Bureau in regard to its investigation of the case was untenable, and denial of their petition for such inspection did not violate any of their rights under this section or under U.S. Const., Amends. V, VI, VII and XIV. State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334, cert. denied, 377 U.S. 978, 84 S. Ct. 1884, 12 L. Ed. 2d 747 (1964).

**State's Failure to Turn Over Ballistics Testing.** — Defendant's right to confrontation was violated when the trial court, after ordering the State to turn over test-fired bullets and underlying data examinations for a defense ballistics examination, upon the State's revelation that it had lost the original shells, refused to require the State to retest the weapon in question and allowed the State's ballistics expert to testify. State v. Canady, 355 N.C. 242, 559 S.E.2d 762, 2002 N.C. LEXIS 176 (2002).

**Withdrawal of Witness Before Cross-Examination.** — Where, during the testimony of a witness, the prosecution asks for and receives permission to withdraw the witness to be recalled later, but closes its case without recalling the witness, defendant, if he wishes to assert his right to cross-examine the witness, must request the court to have the witness return to the stand, and when he fails to do so, he may not assert that he was deprived of his constitutional right of confrontation. State v. Gattison, 266 N.C. 669, 146 S.E.2d 825 (1966), overruled on other grounds, 312 N.C. 276, 322 S.E.2d 133 (1984).

**Use of Closed-Circuit Television in Courtroom Held Adequate to Allow Defendant to Cross-Examine Child Victim.** — Where, in prosecution for taking indecent liberties with a four-year-old child, during voir dire hearing as to victim's competency as a witness, defendant, although absent from the courtroom, was able to hear all testimony, interact freely with his attorney, and through his attorney confront the victim, thereby accomplishing effective cross-examination, the exclusion of defendant did not violate N.C. Const., Art. I, §§ 18, 19 or 23, as the trial court's use of a closed-circuit television and its act of providing defendant and his attorney adequate opportunity to communicate during the victim's testimony were sufficient to permit defendant to hear the evidence and to refute it. State v. Jones, 89 N.C. App. 584, 367 S.E.2d 139 (1988).

**State Fulfilled Confrontation Clause Requirement by Showing Good Faith Attempt.** — Where a four-year-old child was unable to answer question put to her regarding sexual abuse due to fear, the judge's declaration that the child "is simply going to be unable to testify," amounted to an implicit declaration of unavailability; the State fulfilled the constitutional requirement of the confrontation clause by showing a good faith attempt to secure the witness for trial since the State produced the witness and attempted to elicit her testimony. State v. Chandler, 324 N.C. 172, 376 S.E.2d 728 (1989).

**State Violated Confrontation Clause Requirement Where Good Faith Efforts Were Not Shown.** — In a capital murder case, defendant's confrontation rights were violated where there was insufficient evidence to support a conclusion that the State employed good-faith efforts to contact and produce a witness at sentencing. State v. Nobles, 357 N.C. 433, 584 S.E.2d 765, 2003 N.C. LEXIS 830 (2003).

**Admission of Prior Testimony.** — Where a trial was terminated prior to verdict at the instance of defendant in order to obtain other counsel, the testimony of a witness at such trial, with full cross-examination taken in open court and properly attested, was properly admitted in evidence at the subsequent trial when it appeared that the witness was then on military duty outside the boundaries of the United States, and the admission of such testimony did not violate defendant's right of confrontation. State v. Prince, 270 N.C. 769, 154 S.E.2d 897 (1967).

**Admission of Prior Testimony.** — The admission of co-conspirator/brother's prior trial testimony did not violate the defendant's state or federal constitutional rights to confrontation and cross-examination; where the testimony was trustworthy and more probative than any other evidence which the state could produce through reasonable efforts. State v. McNeill, 140 N.C. App. 450, 537 S.E.2d 518, 2000 N.C. App. LEXIS 1208 (2000).

**Admission of Hearsay Evidence Pursuant to an Exception for an Unavailable Declarant.** — Appellate court erred in finding that defendant's right to confrontation pursuant to N.C. Const., Art. I, § 23 was violated by allowing an officer to testify pursuant to G.S. 8C-1, N.C. R. Evid. 804(b)(5), that the deceased victim picked defendant from a lineup; although the hearsay statement was testimonial, and thus implicated the confrontation clause, the error was harmless pursuant to G.S. 15A-1443(b), as the outcome of the trial probably would have been the same if the lineup was excluded. State v. Lewis, 360 N.C. 1, 619 S.E.2d 830, 2005 N.C. LEXIS 1000 (2005), vacated, remanded, Lewis v. North Carolina, 126 S. Ct. 2983, 165 L.Ed.2d 985 (2006) (remanded for further consideration in light of Davis v. Washington, 126 S. Ct. 226, 165 L.Ed.2d 224 (2006)).

**The trial court's admission of the victim's testimony from a domestic violence protective order hearing** did not violate his right to confront the witness against him as guaranteed by both the Sixth Amendment to the United States Constitution and this section, nor did it violate G.S. 8C-1, Rules 803(3), 404(b), and 403 of the North Carolina Rules of Evidence, where the hearsay statements constituted, and were admissible as, statements of the declarant's then-existing mental, emotional, or physical condition and where their probative value outweighed their prejudicial effect. State v. Thibodeaux, 352 N.C. 570, 532 S.E.2d 797, 2000 N.C. LEXIS 615 (2000), cert denied, 531 U.S. 1155, 121 S. Ct. 1106, 148 L. Ed. 2d 976 (2001).

**Record Showing Guilty Plea by Codefendant.** — In a prosecution for aiding and abetting, admission of record showing that codefendants had pleaded guilty to the offense deprived defendant of her right of confrontation. State v. Jackson, 270 N.C. 773, 155 S.E.2d 236 (1967).

**Where defendant changed his plea** from guilty to not guilty and requested the court to allow him time to obtain witnesses from other states, it was error for the court to force him to trial on the succeeding day, since, under the facts of the case, defendant was not given time to prepare for trial. State v. Whisnant, 271 N.C. 736, 157 S.E.2d 545 (1967).

**Deprivation of Right to Call for Evidence.** — Where the effect of failure of the arresting officer and of the custodian of the arrested person to perform their respective duties was such as to deprive the person of the constitutional right to call for evidence in his favor, his subsequent conviction lacked the required due process of law and could not stand. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

**Extrajudicial statements made by defendants which implicated a codefendant** were not inadmissible where each declarant took the stand and testified that the substance of the statements attributed to him was false. State v. Jones, 280 N.C. 322, 185 S.E.2d 858 (1972).

**Death Certificate.** — Defendant's right to confrontation and his right to fundamental fairness in a criminal trial guaranteed by due process were violated by the admission in evidence of the hearsay and conclusory statement in the victim's death certificate. State v. Watson, 281 N.C. 221, 188 S.E.2d 289, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972).

**Disclosure of Informant.** — Disclosure of informant whose information led the police to defendant would not be relevant or helpful to defendant where there was ample independent evidence of his guilt. State v. McDougald, 18 N.C. App. 407, 197 S.E.2d 11, cert. denied, 283 N.C. 756, 198 S.E.2d 726 (1973).

Where defendant did not contend that informant participated in or witnessed alleged crime, he had no constitutional right to discover the name of the informant. State v. Ketchie, 286 N.C. 387, 211 S.E.2d 207 (1975).

**Inspection of Witness' Statement.** — Defendants' constitutionally protected rights of confrontation, due process, and equal protection were violated by the denial of their request to inspect what they contended was a written pretrial out-of-court statement by the State's witness. State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976).

**Search Warrant and Affidavit.** — It is error to allow a search warrant together with the affidavit to obtain the search warrant to be introduced into evidence, because the statements and allegations contained in the affidavit are hearsay statements which deprive the accused of his rights of confrontation and cross-examination. State v. Jackson, 24 N.C. App.

394, 210 S.E.2d 876, rev'd on other grounds, 287 N.C. 470, 215 S.E.2d 123 (1975).

**Admission of Evidence Held Proper.** — In defendant's trial on charges of first degree murder, first degree burglary, second degree kidnapping, and robbery with a dangerous weapon, the trial court properly admitted the videotaped statement defendant's wife gave to police, pursuant to G.S. 8C-1, N.C. R. Evid. 804(b)(5), after defendant's wife refused to testify for the State at defendant's trial, properly admitted letters one of defendant's co-conspirators wrote to a girlfriend urging the girlfriend to lie about the girlfriend's involvement in the co-conspirator's attempt to conceal evidence of the crime, pursuant to G.S. 8C-1, N.C. R. Evid. 804(b)(3), (b)(5), and properly admitted evidence of similar crimes defendant committed shortly after the murder, pursuant to G.S. 8C-1, N.C. R. Evid. 404(b). State v. Carter, 156 N.C. App. 446, 577 S.E.2d 640, 2003 N.C. App. LEXIS 178 (2003), cert. denied, 358 N.C. 547, — S.E.2d — (2004), cert. denied, — U.S. —, 125 S. Ct. 868, 160 L. Ed. 2d 784 (2005).

**Admission of Deposition Testimony of State's Absent Witness.** — Even though it was error to admit the State's physician's deposition testimony at defendant's murder trial even though the defendant took advantage of his right to cross examine the physician at the deposition, because the defendant did not have the right to confront him at trial; the error was harmless error in view of the overwhelming testimonial and other evidence that the victim died and of the defendant's guilt. State v. Ash, 169 N.C. App. 715, 611 S.E.2d 855, 2005 N.C. App. LEXIS 809 (2005), cert. denied, appeal dismissed, 360 N.C. 66, 621 S.E.2d 878 (2005).

**Admission of Hearsay Evidence Where the Declarant was Unavailable.** — For purposes of a claim of a confrontation clause violation under N.C. Const., Art. I, § 23, a trial court's confrontation clause analysis of a statement should proceed as follows: the initial determination is whether the statement is testimonial or nontestimonial, and if the statement is testimonial, the trial court must then ask whether the declarant is available or unavailable to testify during the trial; if the declarant is unavailable pursuant to the G.S. 8C-1, N.C. R. Evid. 804(b)(5) hearsay exception, the trial court must determine whether the accused had a prior opportunity to cross-examine the declarant about this statement, and if the accused had such an opportunity, the statement may be admissible if it is not otherwise excludable hearsay, but if the accused did not have this opportunity, the statement must be excluded. State v. Lewis, 360 N.C. 1, 619 S.E.2d 830, 2005 N.C. LEXIS 1000 (2005), vacated, remanded, Lewis v. North Carolina, 126 S. Ct. 2983, 165 L.Ed.2d 985 (2006) (remanded for further consideration in light of Davis v. Washington, 126 S. Ct. 226, 165 L.Ed.2d 224 (2006)).

**Trial court's denial of defendant's motion for separate trial** so prejudiced his defense as to amount to a denial of due process and his right to confrontation where defendant was precluded under the circumstances of the joint trial from introducing evidence of codefendant's out-of-court statement, which would have strengthened defendant's alibi defense. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

**New Trial Required Where In-Chambers Conference Held in Defendant's Absence.** — Because in-chambers conference that took place with the attorneys in defendant's absence at conclusion of testimony by forensic psychiatry expert was not recorded, and the nature and content of the private discussion could not be gleaned from the record, the state failed to meet its burden of showing that holding in-chambers discussion in defendant's absence was harmless beyond a reasonable doubt, and a new trial was ordered. State v. Exum, 343 N.C. 291, 470 S.E.2d 333 (1996).

**Waiver of Plain Error Review.** — Defendant's claim that he was deprived of his constitutional rights under the Confrontation Clause by the admission of out-of-court statements was waived under N.C. R. App. P. 10(b)(1) because defendant lodged only a general objection but did not object on constitutional grounds and did not assert on appeal plain error, as permitted under Rule 10(c); thus, plain error review was waived, and defendant's constitutional argument was not properly before the court on appeal. State v. Johnson, 181 N.C. App. 287, 639 S.E.2d 78, 2007 N.C. App. LEXIS 17 (2007), cert. denied, appeal dismissed, 361 N.C. 364, 644 S.E.2d 555 (2007).

**No Error in Quashing Subpoena Where Defendant Never Showed Necessity for Compliance.** — In an armed robbery prosecution, the trial court did not err in allowing the state's motion to quash the defendant's subpoena for "all the sawed-off shotguns confiscated by the Greensboro Police Department" since the date of the robbery, since defendant never stated why compliance with the subpoena was necessary to his defense, and the burden was on defendant not only to show error but also to show that the error complained of affected the result adversely to him. State v. Allen, 301 N.C. 489, 272 S.E.2d 116 (1980).

**Trial court properly determined that in-court identifications were not tainted** by a pretrial photographic procedure, where the court found upon supporting voir dire evidence that the witnesses had ample opportunity to observe defendant during the course of the robbery in question; the in-court identifications of defendant were of independent origin based solely on what the witnesses saw at the time of the robbery and did not result from any out-of-court confrontation, photograph, or pretrial identification procedure; and the pretrial photographic procedures were not so unnecessarily suggestive as to lead to irreparable mistaken identification. State v. Allen, 301 N.C. 489, 272 S.E.2d 116 (1980).

**Judge's Recordation of Findings.** — Defendant was not prejudiced by any error that might have resulted from a proceeding, conducted after an evidentiary hearing outside the presence of the jury and after the trial court ruled on defendant's suppression motions in open court, in which the judge merely recorded his own observations with the aid of the prosecutor and a witness; the record was silent as to whether the defendant was present or absent. State v. Blakeney, 352 N.C. 287, 531 S.E.2d 799, 2000 N.C. LEXIS 528 (2000), cert. denied, 531 U.S. 1117, 121 S. Ct. 868, 148 L. Ed. 2d 780 (2001).

**Violation of Confrontation Clause Was Not Shown.** — Where defendant had the opportunity to cross-examine both witnesses in his murder trial the confrontation clause was not violated as to the victim's grandmother's testimony concerning what she told the defendant and as to the letter written from the victim to the defendant, authenticated by two witnesses. State v. Quick, 323 N.C. 675, 375 S.E.2d 156 (1989).

A capital murder defendant's confrontation rights were not prejudicially violated by his absence from an in-chambers conference, where the court allowed the defendant's request to record the trial in its entirety and discussed possible sequestration of certain witnesses, because these discussions did not relate in any material way to the pending charges. State v. Hayes, 130 N.C. App. 154, 502 S.E.2d 853 (1998), aff'd, 350 N.C. 79, 511 S.E.2d 302 (1999).

Hearsay testimony concerning statements made by a child to a licensed psychological associate during an evaluation interview by a medical center's child sexual abuse team did not violate the defendant's confrontation rights, where the child was found incompetent to testify, and the statements were found to be trustworthy in that they were made for the purpose of medical diagnosis or treatment, and there was no evidence that law enforcement officials were involved in the decision to evaluate the child. State v. Waddell, 130 N.C. App. 488, 504 S.E.2d 84, 1998 N.C. App. LEXIS 1005 (1998), aff'd in part and modified in part, 351 N.C. 413, 527 S.E.2d 644 (2000).

Defendant's confrontation rights under N.C. Const., Art. I, § 23 were not violated when the trial court refused to allow defendant to cross-examine the witness about the witness's disciplinary record, as there were confidentiality concerns about the record pursuant to G.S. 115C-402, and defendant failed to show how the disciplinary record was relevant to impeach the witness's credibility under G.S. 8C-1, Rule 608(b). State v. Oliver, 159 N.C. App. 451, 584 S.E.2d 86, 2003 N.C. App. LEXIS 1494 (2003).

There was no error in the limitation on defendant's cross-examination of the victim where the reasons for her unwillingness to testify and the possibility of her being held in contempt did not bear on her credibility or bias toward defendant, nor was whether she believed defendant had been tried "enough" relevant to any matter at issue in the trial. State v. Jacobs, 172 N.C. App. 220, 616 S.E.2d 306, 2005 N.C. App. LEXIS 1586 (2005).

Because defendant's cross-examination was not restricted by law, and the trial court did not limit the scope of the examination, defendant's only limitation in cross-examining the police captain was his inability to play the lost videotape to the jury, and defendant had ample opportunity to cross-examine the captain regarding the quality of the videotape, his viewing of the videotape, and about what he saw on the videotape; defendant's confrontation rights under the Sixth Amendment were vindicated and his right to confrontation under N.C. Const., Art. I, § 23 was not violated. State v. Thorne, 173 N.C. App. 393, 618 S.E.2d 790, 2005 N.C. App. LEXIS 2031 (2005).

Defendant's right to presence was not violated when the trial judge met with the jury to thank them for their service before discharging them because the jury's service was complete at the time; the meeting occurred after the jury had delivered a unanimous verdict, had been polled, and the trial court recorded the verdict. State v. Badgett, 361 N.C. 234, 644 S.E.2d 206, 2007 N.C. LEXIS 416 (2007).

Right to confrontation was not violated when the trial court refused to allow defendant to cross-examine a witness regarding the witness's alleged biased because there was no evidence that the witness, an inmate, received concessions for participating in the case against defendant. State v. Williams, 185 N.C. App. 318, 648 S.E.2d 896, 2007 N.C. App. LEXIS 1824 (2007), appeal dismissed, review denied, 362 N.C. 372 (2008).

Defendant did not show that law enforcement officers' statements identifying defendant by defendant's nickname constituted inadmissible hearsay and, thus, defendant did not show a prerequisite for a Confrontation Clause violation, namely, that hearsay was involved; the law enforcement officers' identification of defendant was not admitted for the truth of the matter asserted, but instead was admitted to show why their investigation focused on defendant in a case where defendant shot another person. State v. Tate, 187 N.C. App. 593, 653 S.E.2d 892, 2007 N.C. App. LEXIS 2553 (2007).

**Brevity and Reliability of Witness.** — Where testifying witness observed defendant during the day, from a short distance, and long enough to notice his unseasonable clothing, witness's identification of him was not too brief and therefore not inherently incredible, and its admittance into evidence was not violative of his due process rights under this section and N.C. Const., Art. I, §§ 19 and 27. State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

**Unavailable Witness.** — Where the record demonstrated the necessity for using hearsay declarations (in this case, unavailability of the witness), and the inherent trustworthiness of the declarations, defendant's confrontation rights were not violated. State v. Deanes, 323 N.C. 508, 374 S.E.2d 249 (1988), cert. denied, 490 U.S. 1101, 109 S. Ct. 2455, 104 L. Ed. 2d 1009 (1989).

Where child victim was unavailable to testify against defendant/father, admission of hearsay statements did not infringe upon the defendant's constitutional right to confront witnesses. State v. Pretty, 134 N.C. App. 379, 517 S.E.2d 677, 1999 N.C. App. LEXIS 803 (1999), cert. denied, appeal dismissed, 351 N.C. 117, 540 S.E.2d 745 (1999).

**Subject Matter of Bench Conference.** — No error where the court documented the subject matter of the bench conference, either at the time of the conference or later in the transcript, and the record demonstrated that none of these conferences implicated defendant's right to confrontation. State v. Harden, 344 N.C. 542, 476 S.E.2d 658 (1996).

**Failure of the trial court to grant defendant's requested recess** so that defendant could get a bench warrant for a defense witness did not violate defendant's Sixth Amendment right under the United States Constitution to have compulsory process to obtain witnesses and his right under the North Carolina Constitution to confront his accusers with witnesses and other testimony pursuant to this section. State v. Beck, 346 N.C. 750, 487 S.E.2d 751 (1997).

**Trial court's exclusion of defendant's proposed cross-examination regarding co-defendant's outstanding warrants** was reasonable in view of its repetitive and cumulative effect, was at any rate harmless error beyond a reasonable doubt, and was not a violation of the North Carolina Constitution. State v. McNeil, 350 N.C. 657, 518 S.E.2d 486, 1999 N.C. LEXIS 880 (1999), cert. denied, 529 U.S. 1024, 120 S. Ct. 1432, 146 L. Ed. 2d 321 (2000).

**Although a juvenile was not present during an evaluator's testimony by conference call,** excluding him was harmless beyond a reasonable doubt, as the conference call occurred in the presence of the juvenile's counsel, who cross-examined the witness, the substance of the conference call was placed on the record, the evaluator's opinion was reduced to writing and available to all parties, and the juvenile did not object to his own absence. In re Lineberry, 154 N.C. App. 246, 572 S.E.2d 229, 2002 N.C. App. LEXIS 1456 (2002).

**New Trial Ordered Where Detective Allowed to Read a Witness' Statement Taken During Questioning.** — Defendant's confrontation clause rights were violated when a trial court allowed a detective to read into evidence a statement the detective took while questioning a suspect in a stolen goods case; regardless of whether the man was unavailable, the statement was testimonial since it was taken in the course of interrogations and defendant had not had a prior opportunity to cross-examine the man regarding his statements; since that was the State's only evidence showing defendant knew the items he possessed were stolen, the error was not harmless and defendant was entitled to a new trial on charges of possession of stolen goods in violation of G.S. 14-17.1. State v. Morton, 166 N.C. App. 477, 601 S.E.2d 873, 2004 N.C. App. LEXIS 1739 (2004).

**Requested Instructions.** — In defendant's conviction for robbery with firearm, the trial court did not err in denying defendant's requested jury instructions that the victim had an interest in this case because of pending criminal charges; although the trial court's instruction was more general than defendant's requested instructions, it substantially conformed with defendant's request, and defendant was also allowed to cross-examine the victim regarding the pending criminal charges, and was allowed to argue the point to the jury. State v. Geddie, — N.C. App. —, — S.E.2d —, 2003 N.C. App. LEXIS 85 (Feb. 18, 2003).

**Denial of Continuance Motion.** — Trial court did not err in denying defendant's motion for a continuance where the state, in defendant's attempted first-degree murder and assault with a deadly weapon case, presented defendant with a statement on the morning of trial that it had obtained from the man who had allegedly sold defendant the gun used in the shootings involved in defendant's case; defendant had not shown evidence that he would have been better prepared had the motion to continue been granted or that he was materially prejudiced by the denial of his motion, and defendant was given a recess by the trial court to allow his counsel to interview the man. State v. Bethea, 173 N.C. App. 43, 617 S.E.2d 687, 2005 N.C. App. LEXIS 1907 (2005).

Defendant's constitutional right to presence at trial was not violated by the denial of motions for continuance because defendant's absence from the second and third days of trial was only explained by contact with a defense witness, not defense counsel or the trial court, indicating that defendant was in the hospital with chest pains; a letter indicating that defendant had been in the hospital for observation did not offer a diagnosis or prognosis, and, thus, no medical emergency was shown, so defendant's absence could not be deemed involuntary. State v. Russell, 188 N.C. App. 625, 655 S.E.2d 887, 2008 N.C. App. LEXIS 196 (2008).

Denial of motion for a continuance to secure the attendance and testimony of a sergeant as a necessary and material witness for the defense was not erroneous because defendant did not articulate any specific facts about which the sergeant would testify and which would substantiate defendant's defense. State v. Walston, — N.C. App. —, 666 S.E.2d 872, 2008 N.C. App. LEXIS 1749 (2008).

**Defendant's presence during drawing of prospective jurors.** — Defendant was not deprived of his right to presence under the confrontation cause of the Constitution of North Carolina, as nothing suggested that the clerk failed to draw prospective jurors at random, in open court, and in defendant's presence. State v. Badgett, 361 N.C. 234, 644 S.E.2d 206, 2007 N.C. LEXIS 416 (2007).

## IV. RIGHT TO COUNSEL.

### A. In General.

**Right to Counsel Guaranteed.** — An accused's right to counsel in a criminal prosecution is guaranteed by the U.S. Const., Amend. VI and is applicable to the states through U.S. Const., Amend. XIV, N.C. Const., Art. I, § 19 and this section. State v. Shores, 102 N.C. App. 473, 402 S.E.2d 162 (1991).

**A defendant has the constitutional right to be represented by counsel** whom he has selected and employed. State v. Gibson, 229 N.C. 497, 50 S.E.2d 520 (1948); State v. Morris, 275 N.C. 50, 165 S.E.2d 245 (1969).

Both the State and federal Constitutions secure to every man the right to be defended in all criminal prosecutions by counsel whom he selects and retains. State v. Hill, 9 N.C. App. 279, 176 S.E.2d 41 (1970), rev'd on other grounds, 277 N.C. 547, 178 S.E.2d 462 (1971).

**This right is not intended to be an empty formality.** State v. Hill, 9 N.C. App. 279, 176 S.E.2d 41 (1970), rev'd on other grounds, 277 N.C. 547, 178 S.E.2d 462 (1971).

**But to Guarantee Effective Assistance.** — The right to counsel is not intended to be simply an empty formality, but is intended to guarantee effective assistance of counsel. State v. Mathis, 293 N.C. 660, 239 S.E.2d 245 (1977); State v. Hensley, 294 N.C. 231, 240 S.E.2d 332 (1978); State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Constitutional right to counsel has long been recognized as an entitlement to the effective assistance of counsel. State v. Vickers, 306 N.C. 90, 291 S.E.2d 599 (1982).

**But the right to counsel does not guarantee the best available counsel,** errorless counsel, or satisfactory results for the accused. State v. Sneed, 284 N.C. 606, 201 S.E.2d 867 (1974); State v. Fuller, 27 N.C. App. 249, 218 S.E.2d 515 (1975); State v. Mathis, 293 N.C. 660, 239 S.E.2d 245 (1977).

**And defendant's right to select his own counsel cannot be insisted upon in a manner that will obstruct** an orderly procedure in courts of justice, and deprive such courts of the exercise of their inherent powers to control the same. State v. Poole, 305 N.C. 308, 289 S.E.2d 335 (1982).

**Right to Counsel May Be Forfeited.** — The defendant forfeited his right to counsel and the trial court did not err by requiring him to proceed pro se, without conducting an inquiry pursuant to G.S. 15A-1242, where he was twice appointed counsel as an indigent, each time releasing his appointed counsel and retaining private counsel. Defendant was disruptive in the courtroom on two occasions, refused to cooperate with his counsel and assaulted him, resulting in an additional month's delay in the trial. State v. Montgomery, 138 N.C. App. 521, 530 S.E.2d 66, 2000 N.C. App. LEXIS 640 (2000).

**The rights of communication go with the man into the jail,** and reasonable opportunity to exercise them must be afforded by the restraining authorities. The denial of an opportunity to exercise a right is a denial of the right. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

**And Are Not Limited to Receiving Professional Advice from Attorney.** — Under this section a defendant's communication and contacts with the outside world are not limited to receiving professional advice from his attorney. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

A defendant is entitled to consult with friends and relatives and to have them make observations of his person. The right to communicate with counsel and friends necessarily includes the right of access to them. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

The fact that a person is a defendant's lawyer, as well as his friend, does not impair his right to see the defendant at a critical time of the proceedings. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

**The refusal of a jailer to permit the defendant's attorney to confer with him** while he was in jail is a denial of a constitutional right. State v. Hill, 9 N.C. App. 279, 176 S.E.2d 41 (1970), rev'd on other grounds, 277 N.C. 547, 178 S.E.2d 462 (1971).

**Denial of Opportunity to Consult with Counsel, Family or Friends.** — Where defendant was held in custody for nearly ten days without the opportunity to consult with counsel, or confer with his own family and friends, or have his interests protected, and was questioned during this entire period intermittently, denied sleep, and removed from one place to another, all the time being denied the opportunity to consult with counsel or friends, or appear before a committing magistrate, and other requirements such as being fully advised of his constitutional rights were not properly afforded defendant, his rights under this section were directly violated. Pugh v. North Carolina, 238 F. Supp. 721 (E.D.N.C. 1965).

**It is the obligation of the attorney to serve as counselor and advocate** to his client. State v. Luker, 65 N.C. App. 644, 310 S.E.2d 63 (1983), rev'd on other grounds, 65 N.C. App. 644, 316 S.E.2d 309 (1984).

**Counsel Must Have Opportunity to Investigate, Prepare and Present Defense.** — Since the law regards substance rather than form, the constitutional guaranty of the right of counsel contemplates not only that a person charged with crime shall have the privilege of engaging counsel, but also that he and his counsel shall have a reasonable opportunity in the light of all attendant circumstances to investigate, prepare and present his defense. State v. Hill, 9 N.C. App. 279, 176 S.E.2d 41 (1970), rev'd on other grounds, 277 N.C. 547, 178 S.E.2d 462 (1971); State v. Alderman, 25 N.C. App. 14, 212 S.E.2d 205 (1972), appeal dismissed, 287 N.C. 261, 214 S.E.2d 433 (1975).

The right to the assistance of counsel includes the right of counsel to confer with witnesses, to consult with the accused and to prepare his defense. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972); State v. Miller, 288 N.C. 582, 220 S.E.2d 326 (1975).

Implicit in the constitutional right to effective counsel is that an accused and his counsel shall have a reasonable time to investigate, prepare and present the defense. State v. Minshew, 33 N.C. App. 593, 235 S.E.2d 866 (1977).

**Amount of Preparation Time.** — Effective assistance of counsel, as guaranteed by U.S. Const., Amend. VI and N.C. Const., Art. I, § 19 and this section, is denied unless counsel has adequate time to investigate, prepare and present his client's defense. Even so, no set time is guaranteed and whether a defendant is denied effective assistance of counsel must be determined upon the circumstances of each case. State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978); State v. Moore, 39 N.C. App. 643, 251 S.E.2d 647, appeal dismissed, 297 N.C. 178, 254 S.E.2d 39 (1979); State v. Poole, 305 N.C. 308, 289 S.E.2d 335 (1982).

The circumstances surrounding the trial court's denial of the defendant's motion to continue did not demonstrate that it was unlikely that the defendant could have received effective assistance of counsel. The defendant failed to offer evidence tending to establish a violation of his constitutional right to a reasonable time to investigate, prepare and present his defense for murder charge and did not show that he had inadequate time to confer with counsel or that counsel had inadequate time to prepare for trial. State v. Tunstall, 334 N.C. 320, 432 S.E.2d 331 (1993).

**Responsibility of Defendant for Lack of Preparation Time.** — The conduct of a defendant in failing either to retain counsel or to avail himself of his right to court appointed counsel, if he is indigent, may make him solely responsible for any lack of trial preparation on the part of his counsel. State v. McDiarmid, 36 N.C. App. 230, 243 S.E.2d 398 (1978).

Where defendant was offered an opportunity to contact counsel, and he assured officers that he would seek his own counsel to assist him, and continued to assure the officers that he intended to employ private counsel, defendant's constitutional rights were not violated by eight days' delay in appointment of counsel. State v. Avery, 286 N.C. 459, 212 S.E.2d 142 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

**When Failure to Grant Continuance Is Denial of Effective Assistance.** — Unless counsel suggests the existence of material witnesses or information that would possibly lead to material evidence or material witnesses, the mere failure to grant a continuance in order to make an investigation would not, in and of itself, constitute a denial of effective assistance of counsel. State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978).

In a prosecution for kidnapping and assaulting a policeman with a firearm, the trial court erred in denying defendant's motion for a continuance where the 17 days defendant's counsel had to prepare for trial was not a reasonable time under the circumstances. State v. Moore, 39 N.C. App. 643, 251 S.E.2d 647, appeal dismissed, 297 N.C. 178, 254 S.E.2d 39 (1979).

Where after the convening of the term the trial court ordered a special venire from another county to try defendant for rape, and counsel for defendant challenged the array on the ground that persons of defendant's race had been excluded from the jury list solely because of their race, but the court refused the request of counsel for time to investigate and secure evidence in support of such challenge to the array, although counsel obtained evidence from members of the special venire and bystanders of the courtroom tending to sustain the challenge, it was held that as it appeared that defendant was prejudiced by denial of reasonable opportunity to procure evidence in support of his challenge to the array, a new trial would be awarded for the denial of defendant's constitutional right to be properly represented by counsel. State v. Speller, 230 N.C. 345, 53 S.E.2d 294 (1949).

The defendant was entitled to a new trial because the court's denials of his repeated motions for a continuance resulted in a violation of his constitutional rights to effective assistance of counsel, to confront his accusers, and to due process of law. Defendant's counsels had only thirty-four days to prepare for a complex, bifurcated capital case, involving multiple incidents in multiple locations over a two-day period, which they took over from another attorney who had done little other than filing pretrial motions while trying to persuade the defendant to accept a plea bargain. No evidence existed that any witness interviews had been performed; the orders based on the trial court's rulings on pretrial motions had not been prepared; and a jury questionnaire was not submitted for distribution to prospective jurors. State v. Rogers, 352 N.C. 119, 529 S.E.2d 671, 2000 N.C. LEXIS 430 (2000).

**There are no set rules to determine whether a defendant has been deprived of effective assistance** of counsel; rather each case must be approached upon an ad hoc basis, viewing circumstances as a whole in order to determine this question. State v. Hensley, 294 N.C. 231, 240 S.E.2d 332 (1978).

**The question of inadequacy of representation cannot be determined solely upon the amount of time counsel spends** with the accused or upon the intensiveness of his investigation. State v. Sneed, 284 N.C. 606, 201 S.E.2d 867 (1974).

**Test of effective assistance of counsel** is whether the assistance given was within the range of competence demanded of attorneys in criminal cases. State v. Vickers, 306 N.C. 90, 291 S.E.2d 599 (1982); State v. Scober, 74 N.C. App. 469, 328 S.E.2d 590 (1985).

The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial could not be relied on as having produced a just result. State v. Dockery, 78 N.C. App. 190, 336 S.E.2d 719 (1985).

**Farce and Mockery of Justice Test.** — The incompetency of counsel for the defendant in a criminal prosecution is not a constitutional denial of his right to effective counsel unless the attorney's representation is so lacking that the trial has become a farce and a mockery of justice. State v. Sneed, 284 N.C. 606, 201 S.E.2d 867 (1974); State v. Mathis, 293 N.C. 660, 239 S.E.2d 245 (1977); State v. McDiarmid, 36 N.C. App. 230, 243 S.E.2d 398 (1978); State v. Roberts, 49 N.C. App. 52, 270 S.E.2d 559 (1980), appeal dismissed and cert. denied, 301 N.C. 726, 276 S.E.2d 286 (1981).

**Each case must be approached upon an ad hoc basis,** viewing the circumstances as a whole, in order to determine whether an accused has been deprived of effective assistance of counsel. State v. Sneed, 284 N.C. 606, 201 S.E.2d 867 (1974); State v. Roberts, 49 N.C. App. 52, 270 S.E.2d 559 (1980), appeal dismissed and cert. denied, 301 N.C. 726, 276 S.E.2d 286 (1981).

**Breach of Attorneys' Duty Does Not Automatically Require Reversal.** — The duties of an attorney representing a criminal defendant include the duty of loyalty, a duty to advocate defendant's cause, and the duty to consult with defendant, investigate defendant's case and keep defendant informed. However, a breach of one of these duties does not automatically require reversal of defendant's conviction. Defendant must also demonstrate that the professionally unreasonable conduct of his counsel resulted in prejudice to defendant. State v. Dockery, 78 N.C. App. 190, 336 S.E.2d 719 (1985).

**For case upholding finding of fact that defendant's counsel was not ineffective but that if he was, defendant did not show any prejudice,** see State v. Swann, 322 N.C. 666, 370 S.E.2d 533 (1988).

**Appointment on Day Before Trial.** — It is not ipso facto a denial of effective assistance because counsel were notified of their appointment and on the same day learned that the cases would be called for trial the following day. State v. Alderman, 25 N.C. App. 14, 212 S.E.2d 205 (1972), appeal dismissed, 287 N.C. 261, 214 S.E.2d 433 (1975).

**Conflict of Interest.** — Defendant's rights under the Sixth Amendment and N.C. Const., Art. I, §§ 19 and 23 were not violated by the denial of defense counsel's motion to withdraw since an inquiry was conducted into counsel's allegation that counsel had a conflict of interest under N.C. Rev. R. Prof. Conduct 1.7(a) because a former client was called as a witness against defendant; there was no conflict since: (1) counsel had represented the witness three years prior to defendant's trial and was no longer representing the witness; (2) counsel had no recollection as to specifics of the witness's case aside from the fact that the witness had been convicted; (3) counsel's statement that counsel would review counsel's file to see if counsel had any information to help defendant proved that counsel was committed to defendant's case; and (4) counsel made significant inroads to undermine the witness's credibility. State v. Thomas, 187 N.C. App. 140, 651 S.E.2d 924, 2007 N.C. App. LEXIS 2309 (2007).

**Physical Incapacity.** — The question of effective assistance of counsel involving the physical incapacity of counsel does not turn on the physical incapacity of counsel as such, since this may or may not deprive a defendant of effective representation. Rather, it is necessary to examine counsel's specific acts or omissions. The reviewing court must approach such questions ad hoc and in each case view the circumstances as a whole. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Notwithstanding the defense attorney's hearing disability, his efforts and the assistance of co-counsel provided defendant with effective legal representation throughout the criminal proceedings. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

**Improper Mitigating Factors Tendered.** — The defendant's right to present a complete defense, including evidence of mitigating circumstances, pursuant to this section, was not violated by the exclusion of friend of defendant's statement regarding the effect defendant's death would have on him; a third party's feelings are irrelevant to the capital sentencing proceeding. State v. Hardy, 353 N.C. 122, 540 S.E.2d 334, 2000 N.C. LEXIS 902 (2000), cert. denied, 534 U.S. 840, 122 S. Ct. 96, 151 L. Ed. 2d 56 (2001).

**Denial of Continuance to Prepare Closing Argument.** — Defendant's right to effective assistance of counsel was not denied when the trial court refused to continue the trial to give the defendant's counsel the weekend to prepare a closing argument for the guilt-innocence determination phase of the trial; defense counsel's closing argument met an objective standard of reasonableness and was within the range of competence demanded of attorneys in capital cases. State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), sentence vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990).

**Admission of Testimony of Second Psychiatric Examination.** — Defendant's right to effective assistance of counsel was not violated by admission of second treatment team's testimony as to information obtained during second court-ordered psychiatric examination, even though that admission was for the purpose of determining his capacity to proceed, as opposed to his sanity at the time of the crime; defendant had the opportunity to discuss with his lawyer whether or not to submit to the second court-ordered examination and to discuss its scope as well, and the absence of express language in the second order specifying defendant's examination to determine his mental state at the time of the offenses was not significant. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

In a murder prosecution, the admission of psychiatric testimony as to defendant's mental state at the time of the crime did not affect his right to counsel because he had placed his mental condition in issue when he moved to continue the trial due to his psychiatric illness and asserted the defense of diminished capacity and inability to formulate the intent to kill, and he had the opportunity to consult with counsel concerning the scope of the examination conducted by the testifying psychiatrist. State v. McClary, 157 N.C. App. 70, 577 S.E.2d 690, 2003 N.C. App. LEXIS 378 (2003), appeal dismissed, cert. denied, 357 N.C. 466, 586 S.E.2d 466 (2003).

**The mere fact that defendant was convicted** does not show that his counsel was either incompetent, neglectful or ineffective. State v. Mathis, 293 N.C. 660, 239 S.E.2d 245 (1977).

**Burden on Defendant to Show Supportable Defense.** — In bringing an ineffective assistance claim based on the failure to adequately present a defense, the central question is whether a supportable defense could have been developed. The burden of showing the probability that this defense existed is on the defendant. State v. Dockery, 78 N.C. App. 190, 336 S.E.2d 719 (1985).

**Duty of Trial Court.** — The trial judge, who actually sees the lawyer's behavior, is better able than an appellate court to evaluate the overall effectiveness of representation. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Because defendant did not waive her right to conflict free counsel, she argued that she claimed possession of the heroin and the paraphernalia to protect her boyfriend, and because he was represented by defense counsel's boss, there was a potential for a conflict under N.C. R. Prof. Conduct 1.7(a); thus, a hearing should have been held. State v. Mims, 180 N.C. App. 403, 637 S.E.2d 244, 2006 N.C. App. LEXIS 2405 (2006).

**The question of alleged failure of counsel to render effective representation can be considered on direct appeal.** State v. Hensley, 294 N.C. 231, 240 S.E.2d 332 (1978).

**Decision Not to Introduce Evidence.** — The trial court's deferral of its ruling on whether introduction of certain evidence by defendant would open the door to permit the State to introduce irrelevant and prejudicial evidence about defendant's prior convictions did not improperly chill the defendant's rights to introduce evidence; his decision not to introduce the evidence was purely tactical and did not implicate any rights. State v. Holman, 353 N.C. 174, 540 S.E.2d 18, 2000 N.C. LEXIS 909 (2000), cert. denied, 534 U.S. 910, 122 S. Ct. 250, 151 L. Ed. 2d 181 (2001), cert. denied, — N.C. —, 619 S.E.2d 854 (2005).

**Failure to Request Lesser Included Of-**

**fense in Jury Instruction.** — Defense counsel's decision not to request a charge on common law robbery as a lesser included offense to a charge of robbery with a deadly weapon was not ineffective assistance of counsel because that decision was a viable "all or nothing" trial strategy in which counsel hoped that the jury would find one element of the crime missing and then find defendants not guilty; counsel reasonably used that strategy in an attempt to preserve defendants' military careers, and the fact that the strategy failed did not mean defendants received ineffective assistance of counsel. State v. Walker, 167 N.C. App. 110, 605 S.E.2d 647, 2004 N.C. App. LEXIS 2172 (2004).

**Defense counsel's negative remarks about defendant's intelligence and decision making, at the sentencing hearing, did not amount to ineffective assistance,** but were an attempt to show that defendant was not mentally capable of making informed, reasoned decision and thus, should not be harshly sentenced. State v. Davis, 167 N.C. App. 770, 607 S.E.2d 5, 2005 N.C. App. LEXIS 14 (2005).

**Ineffective Representation Shown.** — The counsel's substandard performance was prejudicial to the rape defendant, where the defense's failure to produce any evidence to support the theories proffered at the outset of the trial, including consent of the victim and inability of the defendant to perform the alleged acts, formed the basis of one of the principal closing arguments made by the State in favor of conviction. State v. Moorman, 320 N.C. 387, 358 S.E.2d 502 (1987).

**Ineffective Representation Not Shown.** — For cases in which ineffective representation of counsel was not shown, see State v. Minshew, 33 N.C. App. 593, 235 S.E.2d 866 (1977); State v. Roberts, 49 N.C. App. 52, 270 S.E.2d 559 (1980), appeal dismissed and cert. denied, 301 N.C. 726, 276 S.E.2d 286 (1981); State v. Jordan, 49 N.C. App. 561, 272 S.E.2d 405 (1980); State v. Attmore, 92 N.C. App. 385, 374 S.E.2d 649 (1988), cert. denied, State v. Danenberg, 151 N.C. 718, 66 S.E. 301, 26 L.R.A. (n.s.) 890 (1909).

Counsel's decision to pursue a theory of sexual asphyxiation or accident instead of suicide was a defense strategy that could not be second-guessed on appeal State v. Scanlon, 176 N.C. App. 410, 626 S.E.2d 770, 2006 N.C. App. LEXIS 541 (2006).

Prisoner's habeas corpus petition pursuant to N.C. Const., Art. I, § 21, was denied; trial counsel did not provide ineffective assistance pursuant to N.C. Const., Art. I, § 23 (2003), in relation to a plea bargain, as defendant's attorney considered a possible affirmative defense and properly determined that the defense was unlikely to succeed. Goode v. Warden, — A.2d —, 2003 Conn. Super. LEXIS 2687 (Conn. Super. Ct. Sept. 25, 2003).

Defendant did not receive ineffective assistance of counsel for counsel's failure to request jury instructions where it was determined that the trial court did not commit error in failing to instruct the jury on those offenses; moreover, defendant was acquitted on two of the five charges submitted to the jury, so he was not prejudiced by counsel's performance. State v. Dickens, 162 N.C. App. 632, 592 S.E.2d 567, 2004 N.C. App. LEXIS 269 (2004).

Defendant's contention that he received ineffective assistance of counsel when his counsel moved for a mistrial as opposed to a new trial or appropriate relief after the jury had already returned its verdict failed where defendant failed to show any prejudice resulting from counsel's failure to make the proper motion. State v. Banks, 163 N.C. App. 31, 591 S.E.2d 917, 2004 N.C. App. LEXIS 257 (2004).

Applying the Wiggins test, North Carolina Supreme Court found that counsel for a death-sentenced defendant was not shown to be ineffective because counsel (1) was not under a mandate to second-guess two mental health experts that opined that certain tests were not necessary to determine whether the defendant had brain damage that would have indicated a murder was not intentional or indicated a mitigator, (2) had interviewed other persons regarding the defendant's behavior patterns to assist in formulating his own opinion, and (3) took into consideration that that particular brain injury defense was not proven to be effective based on the result of the first trial in which the defendant also received a death sentence; the highest court concluded that the counsel did not prematurely abandon a defense based on organic brain damage and that their election to pursue a defense/mitigation strategy predicated on other grounds constituted a reasonable professional judgment. State v. Frogge, 359 N.C. 228, 607 S.E.2d 627, 2005 N.C. LEXIS 29 (2005).

Where defendant was convicted of raping a 13-year-old female, defense counsel was not ineffective for failing to stipulate to the chain of custody of the products of conception to avoid introducing them into evidence; any error was harmless as there was no reasonable probability that the alleged error affected the outcome of the trial. State v. Watts, 172 N.C. App. 58, 616 S.E.2d 290, 2005 N.C. App. LEXIS 1588 (2005), vacated in part, on other grounds, remanded, 361 N.C. 161, 2006 N.C. LEXIS 1402 (2006).

Because there was no plain error in the failure to provide a voluntary intoxication instruction to the jury, defendant's assertion of ineffective assistance of counsel with respect thereto failed; defendant's evidence concerning his low I.Q., smoking marijuana, and sharing alcohol over the course of an evening was not so overwhelming as to render the lack of a voluntary intoxication instruction prejudicial. State v. Andrews, 170 N.C. App. 68, 612 S.E.2d 178, 2005 N.C. App. LEXIS 891 (2005).

Where defendant was sentenced within the presumptive range as a Level VI habitual felon, because he was given a very favorable plea bargain in which twenty-one felony offenses were consolidated for judgment with the original ten felony offenses such that defendant received no additional time for these twenty-one felonies, his sentence was upheld pursuant to G.S. 15A-1340.12, and counsel was not ineffective for failing to object to the sentence as violative of the Eighth Amendment and on grounds that legislative policy considerations constitute ineffective assistance of counsel. State v. Cummings, 174 N.C. App. 772, 622 S.E.2d 183, 2005 N.C. App. LEXIS 2618 (2005).

Defendant did not show that he received ineffective assistance of counsel, as counsel's decision to ask a witness about out-of-court statements made by defendant's cousin was a tactical decision, which an appellate court would not second guess. State v. Medina, 174 N.C. App. 723, 622 S.E.2d 176, 2005 N.C. App. LEXIS 2608 (2005), cert. denied, — N.C. —, 630 S.E.2d 448 (2006).

Mere fact that the state asked defendant to stipulate to a prior felony that did not correspond to the prior felony stated in the indictment did not render the error a substantive evidentiary one attributable to the state; instead, the record revealed an intention by defense counsel, after conferring with defendant, to stipulate to a prior felony and an assumption by the state that the stipulation relieved it of the burden of establishing that element of the possession of a firearm by a felon charge. State v. Mason, 174 N.C. App. 206, 620 S.E.2d 285, 2005 N.C. App. LEXIS 2292 (2005).

As defendant's denial of his pointing of any gun was inconsistent with the defenses of necessity or justification, defendant's attorney made a tactical decision to present a theory of defense based upon defendant's own statements to police; as such, defense counsel's decision not to request jury instructions on necessity and justification with respect to a charge of assault by pointing a gun could not be ineffective assistance of counsel. State v. Langley, 173 N.C. App. 194, 618 S.E.2d 253, 2005 N.C. App. LEXIS 1920 (2005), cert. dismissed, — N.C. —, 630 S.E.2d 447 (2006), cert. denied, — N.C. —, 630 S.E.2d 447 (2006).

Defense counsel's decision to address defendant's repeated lies to defense counsel and others was a prudent stop in pulling the sting from damaging evidence and did not amount to ineffective assistance. State v. Campbell, 177 N.C. App. 520, 629 S.E.2d 345, 2006 N.C. App. LEXIS 1049 (2006).

Defendant's first degree murder conviction for stabbing his wife to death was affirmed because defendant failed to show ineffective assistance of counsel as he did not meet his burden of showing a reasonable probability that, but for defense counsel's failure to raise an issue at trial, the result of his proceedings would have been different. State v. Nguyen, 178 N.C. App. 447, 632 S.E.2d 197, 2006 N.C. App. LEXIS 1571, appeal dismissed, cert. denied, 360 N.C. 653, 637 S.E.2d 189 (2006).

Defendant's claim of ineffective assistance of counsel failed because defendant failed to satisfy his burden that there was a reasonable probability that a different outcome would have occurred if counsel had presented additional evidence of defendant's drug and alcohol problem. State v. Laney, 178 N.C. App. 337, 631 S.E.2d 522, 2006 N.C. App. LEXIS 1398 (2006).

Counsel was not ineffective for failing to move to dismiss the charge of first-degree burglary and the lesser included offenses at the close of evidence, as the victim's testimony that she was awakened by the loud noise of someone kicking the front door and that two men were standing over her father with guns in the room where the door was located, was sufficient evidence to show a breaking and entering took place. State v. Andujar, 180 N.C. App. 305, 636 S.E.2d 584, 2006 N.C. App. LEXIS 2292 (2006).

Trial counsel was not ineffective for failing to make a motion to dismiss the robbery charge and the lesser included offenses because there was testimony that defendant told a witness that he and a friend had committed a robbery of some Mexicans and about some of the specifics of the way the crime was committed. State v. Andujar, 180 N.C. App. 305, 636 S.E.2d 584, 2006 N.C. App. LEXIS 2292 (2006).

Where a prosecutor, during cross-examination in a second-degree murder trial, questioned defendant on the reason for omitting certain important facts from a voluntary discussion with a deputy, counsel's failure to object did not constitute ineffective assistance. State v. Ezzell, 182 N.C. App. 417, 642 S.E.2d 274, 2007 N.C. App. LEXIS 695 (2007), cert. denied, appeal dismissed, 361 N.C. 432, 649 S.E.2d 390 (2007).

Defendant's counsel was not ineffective for failing to object to a special condition of probation because it could not be said that the outcome of the probation revocation hearing would have been any different had counsel for defendant objected to the condition of probation. State v. Howell, 184 N.C. App. 369, 646 S.E.2d 622, 2007 N.C. App. LEXIS 1432 (2007), appeal dismissed, review denied, 362 N.C. 240, 660 S.E.2d 490 (2008).

Counsel's failure to object to the mention of defendant's having taken a polygraph test did not constitute ineffective assistance of counsel in violation of N.C. Const., Art. I, § 23, because given the very slight nature of the evidence, defendant could not show that without them a different result would have been reached. State v. Carter, 186 N.C. App. 259, 650 S.E.2d 650, 2007 N.C. App. LEXIS 2089 (2007).

Defendant did not receive ineffective assistance of counsel, even though counsel did not request recordation under G.S. 15A-1241(b) of opening/closing arguments, jury selection, and rulings on matters of law, as defendant acknowledged that defendant could not show prejudice. State v. Thomas, 187 N.C. App. 140, 651 S.E.2d 924, 2007 N.C. App. LEXIS 2309 (2007).

Defendant's counsel did not provide ineffective assistance of counsel by not renewing an objection to the admissibility of a statement that defendant made to the defendant's spouse regarding the killing of the victim; the statement did not involve a confidential communication pursuant to G.S. 8-57(c) because it was made within the hearing of a third person and, thus, the statement was admissible. State v. Kirby, 187 N.C. App. 367, 653 S.E.2d 174, 2007 N.C. App. LEXIS 2450 (2007), appeal dismissed, review denied, 362 N.C. 241, 660 S.E.2d 493 (2008).

Defendant was not denied effective assistance of counsel when defendant's trial lawyer agreed to stipulate that defendant had a prior felony conviction, without insisting that the nature of the conviction not be disclosed to the jury, as defendant failed to prove that the prior conviction, possession of cocaine, equated with the charges of possession of a firearm by a felon and assault with a deadly weapon inflicting serious bodily injury such that the jury was likely to have believed that if defendant possessed cocaine in the past, defendant was likely to have committed the charged offenses. State v. Tice, 191 N.C. App. 506, 664 S.E.2d 368, 2008 N.C. App. LEXIS 1507 (2008).

Defendant failed to meet the burden of establishing ineffective assistance of counsel by counsel failing to provide notice of defendant's intended defenses at trial because there was no reasonable probability that the alleged error of counsel affected the outcome of the trial as defendant failed to present substantial evidence of either voluntary intoxication or diminished capacity. State v. McDonald, 191 N.C. App. 782, 663 S.E.2d 462, 2008 N.C. App. LEXIS 1496 (2008).

Defendant convicted of voluntary manslaughter did not show that defendant received ineffective assistance of counsel in violation of N.C. Const., Art. I, § 23 and, thus, defendant was not entitled to a reversal of defendant's convictions. Although defendant claimed that counsel's performance was deficient, defendant could not show that defendant did not receive a fair trial, as the claimed deficiencies involved either trial tactics, which were entitled to great deference on appeal, or matters that did not affect the outcome of the trial. State v. Moore, — N.C. App. —, 671 S.E.2d 545, 2009 N.C. App. LEXIS 30 (2009).

**Counsel Not Ineffective for Failing to File Motion to Dismiss.** — Defendant's conviction of robbery with a dangerous weapon, G.S. 14-87, was affirmed because defendant did not receive ineffective assistance of counsel based on a failure to move to dismiss the charge; the evidence was sufficient to support the charge, because the evidence established that defendant used a box cutter, which was classified as a dangerous weapon, and that the victim believed that his life was being threatened. State v. Pratt, 161 N.C. App. 161, 587 S.E.2d 437, 2003 N.C. App. LEXIS 1979 (2003).

Through the testimony of a middle school teacher that defendant, a juvenile, dragged her and struggled while the teacher was trying to prevent defendant from assaulting another student, the State had presented enough evidence for a charge of assault on a state employee in violation of G.S. 14-33(c)(4) to withstand a motion to dismiss. Thus, defense counsel was not ineffective for failing to renew the motion at the close of all of the evidence. In re A.V., 188 N.C. App. 317, 654 S.E.2d 811, 2008 N.C. App. LEXIS 80 (2008).

**Right to Represent Oneself.** — A defendant's right to represent himself is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution; by this section of the North Carolina Constitution; and by G.S. 15A-1242. State v. LeGrande, 346 N.C. 718, 487 S.E.2d 727 (1997).

Defendant was deprived of the constitutional right to self-representation because defendant was not allowed to represent himself despite the fact that the record showed that defendant was competent, understood, and voluntarily exercised his free will, the trial court clearly expressed its that opinion it would be mistake for defendant to represent himself and warned defendant he would have to "play by the rules." State v. Walters, 182 N.C. App. 285, 641 S.E.2d 758, 2007 N.C. App. LEXIS 592 (2007).

**Right to Counsel May Be Waived.** — A defendant in a criminal proceeding, whether at trial or in pretrial proceedings, may waive his right to counsel if he does so freely and understandingly and with full knowledge. State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978); State v. Hyatt, 132 N.C. App. 697, 513 S.E.2d 90 (1999).

First degree felony murder and conspiracy to commit robbery with dangerous weapon convictions were affirmed since the trial court's decision to admit a videotape of the defendant's post-Miranda interrogation was properly based on substantial evidence that he (1) signed a waiver of, and (2) never made a clear, unambiguous, and unequivocal assertion of his right to counsel, and did not assert his right to remain silent. State v. Ash, 169 N.C. App. 715, 611 S.E.2d 855, 2005 N.C. App. LEXIS 809 (2005), cert. denied, appeal dismissed, 360 N.C. 66, 621 S.E.2d 878 (2005).

**But failure to ask for a lawyer does not constitute waiver** of a defendant's right to counsel. State v. Biggs, 289 N.C. 522, 223 S.E.2d 371 (1976).

**But Defendant Need Not Know the Source of the Right Before Waiving It.** — The court disagreed with contention by the defendant that in order to waive his right to counsel a defendant must have explained to him his right to counsel under U.S. Const., Amend. VI and under this section. If a defendant is told he has a right to counsel, as the defendant was, he does not have to know the precise source of the right before waiving it. State v. Palmer, 334 N.C. 104, 431 S.E.2d 172 (1993).

**What Record Must Show on Waiver.** — The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver. State v. Morris, 275 N.C. 50, 165 S.E.2d 245 (1969).

**Duty of Court to Determine If Defendant Has Waived Right to Counsel.** — The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of the trial court, which imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver of counsel by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record. State v. Morris, 275 N.C. 50, 165 S.E.2d 245 (1969).

When the voir dire evidence is conflicting and contradictory on the question of whether a defendant waived his right to counsel, it is incumbent upon the trial judge to weigh the credibility of the witnesses, resolve the crucial conflicts and make appropriate findings of fact. State v. Biggs, 289 N.C. 522, 223 S.E.2d 371 (1976).

Trial court did not err in allowing defendant to represent himself because the court complied with the statutory requirements of G.S. 15A-1242 and G.S. 7A-457 prior to allowing such self-representation; its inquiry that satisfied those provisions fully satisfied the constitutional requirement that any waiver of counsel be knowing and voluntary. State v. Davis, — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 1193 (Aug. 6, 2002), cert. denied, 356 N.C. 170, 568 S.E.2d 623 (2002).

Trial court did not make an adequate determination pursuant to G.S. 15A-1242 and N.C. Const., Art. I, § 23 that defendant's decision to proceed pro se was knowingly, intelligently, and voluntarily made because: (1) defendant did not show that defendant appreciated the consequences of proceeding without counsel, or that defendant understood that murder was punishable by death; (2) it was not sufficient that defendant agreed that defendant had been afforded excellent legal counsel, or that defendant claimed the decision was made without "haste" and was "something that (defendant had) thought about for quite some time"; and (3) that defendant's responses were clear and succinct and that defendant was calm and revealed no sign of confusion, reticence, or hesitation could not substitute for the required inquiry. State v. Moore, 362 N.C. 319, 661 S.E.2d 722, 2008 N.C. LEXIS 493 (2008).

**Affirmative Showing of Waiver by State.** — When the State seeks to offer in evidence a defendant's in-custody statements, made in response to police interrogation and in the absence of counsel, the State must affirmatively show not only that the defendant was fully informed of his rights but also that he knowingly and intelligently waived his right to counsel. State v. Biggs, 289 N.C. 522, 223 S.E.2d 371 (1976).

**Withdrawal of Waiver of Counsel.** — Once given, a waiver of counsel is good and sufficient until the proceedings are terminated or until the defendant makes known to the court that he desires to withdraw the waiver and have counsel assigned to him. State v. Hyatt, 132 N.C. App. 697, 513 S.E.2d 90 (1999).

**A criminal defendant must move** the court to withdraw his prior waiver of counsel. State v. Hyatt, 132 N.C. App. 697, 513 S.E.2d 90 (1999).

**Motion or Request to Withdraw Waiver of Counsel Not Shown.** — Criminal defendant's statements during trial that because he did not have an attorney he did not know how to question jurors or prepare an opening statement did not equate to a motion or request to withdraw his previous waiver of counsel. State v. Hyatt, 132 N.C. App. 697, 513 S.E.2d 90 (1999).

**Appointment of Counsel for Limited Purpose of Furnishing Advice.** — Defendant was not prejudiced in any respect by the appointment of counsel for the limited purpose of furnishing advice to him if so requested, even though defendant did waive counsel and conducted his own defense. State v. Harper, 21 N.C. App. 30, 202 S.E.2d 795, cert. denied, 285 N.C. 375, 205 S.E.2d 100 (1974).

**Rule Requiring Objection to Evidence when Offered Applies to Unrepresented Defendant.** — Unless necessary to obviate manifest injustice, the rule applicable to a represented defendant, that the admission of incompetent evidence alone is not ground for a new trial where there was no objection at the time the evidence was offered, applies equally to an unrepresented nonindigent defendant. State v. Jones, 280 N.C. 322, 185 S.E.2d 858 (1972).

**Right to Counsel Held Waived.** — Even though counsel was appointed for defendant, he waived the right to have counsel when he initiated a conversation and volunteered statements to investigators without being questioned; neither his Fifth Amendment nor his Sixth Amendment rights were violated and his statements were properly admitted at his trial. State v. Boggess, 358 N.C. 676, 600 S.E.2d 453, 2004 N.C. LEXIS 912 (2004).

### B. When Right Applies.

**A defendant is entitled to counsel at every critical stage** of the proceedings against him. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Although a defendant is granted a general right to counsel to assist in his or her defense, that right does not attach to all events leading to trial. The right attaches only to "critical" stages of the proceedings, those proceedings where the presence of counsel is necessary to assure a meaningful defense. State v. Odom, 303 N.C. 163, 277 S.E.2d 352, cert. denied, 454 U.S. 1052, 102 S. Ct. 596, 70 L. Ed. 2d 587 (1981), rehearing denied, 454 U.S. 1165, 102 S. Ct. 1041, 71 L. Ed. 2d 322 (1982).

**Determining When Proceeding Is a Critical Stage.** — In deciding whether a particular proceeding constitutes a critical stage, courts must focus their inquiry on whether the presence of counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right to meaningfully cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. State v. Odom, 303 N.C. 163, 277 S.E.2d 352, cert. denied, 454 U.S. 1052, 102 S. Ct. 596, 70 L. Ed. 2d 587 (1981), rehearing denied, 454 U.S. 1165, 102 S. Ct. 1041, 71 L. Ed. 2d 322 (1982).

The guarantee of counsel only applies to "critical stages" of the prosecution, and what constitutes a critical stage is determined both from the nature of the proceedings and from the facts in each case. State v. Hall, 39 N.C. App. 728, 252 S.E.2d 100 (1979).

**In Connection With Right to Testify.** — Defendant was improperly forced to choose between testifying in defendant's own behalf or being represented by counsel at trial; by choosing to testify, defendant was forced to relinquish defendant's constitutional right to the assistance of counsel under the Sixth Amendment and N.C. Const., Art. I, § 23. The error was not harmless under subsection (b) of G.S. 15A-1443 since the right to counsel was so basic to a fair trial that its infraction could never be treated as harmless error. State v. Colson, 186 N.C. App. 281, 650 S.E.2d 656, 2007 N.C. App. LEXIS 2084 (2007), cert. denied, appeal dismissed, 362 N.C. 89, 656 S.E.2d 280 (2007), review denied, 362 N.C. 89, 656 S.E.2d 280 (2007), State v. Colson, 186 N.C. App. 281, 650 S.E.2d 656, 2007 N.C. App. LEXIS 2084 (2007), cert. denied, appeal dismissed, 362 N.C. 89, 656 S.E.2d 280 (2007).

**Administration of Gunshot Residue Test.** — The administration of a gunshot residue test is not a critical stage of the criminal proceedings to which the constitutional right to counsel attaches. State v. Odom, 303 N.C. 163, 277 S.E.2d 352, cert. denied, 454 U.S. 1052, 102 S. Ct. 596, 70 L. Ed. 2d 587 (1981), rehearing denied, 454 U.S. 1165, 102 S. Ct. 1041, 71 L. Ed. 2d 322 (1982).

**Pretrial Identification Proceedings.** — A defendant has a constitutional right to presence of counsel during a pretrial identification only when adversary judicial criminal proceedings have been instituted against him prior to the confrontation. State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980).

**Identification in One-Man Showup Conducted at Victim's Home.** — The trial court properly admitted a burglary victim's in-court identification of defendant and evidence of the victim's identification of defendant in a one-man showup conducted at the victim's home within an hour after the crime and at a time when defendant was without counsel and had not waived counsel since (1) defendant was not entitled to counsel at the one-man showup because he was not in custody, (2) there was no reasonable possibility that the one-man showup could have led to a mistaken identification or contributed to defendant's conviction, and (3) the in-court identification of defendant by the victim was independent in origin and was not influenced by the showup. State v. Tann, 302 N.C. 89, 273 S.E.2d 720 (1981).

**Lineup.** — Accused is constitutionally guaranteed counsel at an in-custody lineup identification. When counsel is not present at the lineup, testimony of witnesses that they identified the accused at the lineup is rendered inadmissible, and any in-court identification is also rendered inadmissible, unless the trial judge first determines on a voir dire hearing that the in-court identification is of independent origin and is untainted by the illegal lineup. State v. Ingram, 20 N.C. App. 35, 200 S.E.2d 417 (1973).

Unless presence of counsel at a lineup is understandingly waived by the accused, testimony concerning the lineup must be excluded in absence of counsel's attendance. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

**Examination of Photographs.** — Right to counsel's presence is not extended to out-of-court examinations of photographs which include a suspect, whether he is in custody or at liberty. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

An accused has no constitutional right to the presence of counsel when eyewitnesses are viewing photographs for purposes of identification, and this is true regardless of whether the suspect is at liberty or in custody at the time. State v. Miller, 288 N.C. 582, 220 S.E.2d 326 (1975).

**Probable Cause Hearing.** — A probable cause hearing is a "critical stage" of the criminal process entitling an indigent person to appointed counsel if he desires assistance of counsel. State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978).

Where defendant had waived his right to have assigned counsel at the preliminary hearing, but made a specific request for a lawyer prior to the selection of the jury at his trial in the superior court, he was entitled to be represented by counsel. State v. Haire, 19 N.C. App. 89, 198 S.E.2d 31 (1973).

**Jury Instructions.** — The trial court committed reversible error by administering admonitions to the jurors out of open court and in the absence of the defendant, counsel, or a court reporter. State v. Payne, 320 N.C. 138, 357 S.E.2d 612 (1987); State v. Boyd, 332 N.C. 101, 418 S.E.2d 471 (1992).

Although the trial court erred in refusing to allow defendant's counsel to examine the questions that the jury posed in defendant's murder trial, the circumstances did not completely deprive defendant of counsel; after the trial court received the questions, the trial court merely repeated the original jury instructions that it had given and did not give any new instructions. State v. Smith, 188 N.C. App. 207, 654 S.E.2d 730, 2008 N.C. App. LEXIS 92 (2008).

**What Constitutes Critical Stage Where Offense Involves Intoxication.** — A critical stage has been reached in a defendant's case when, immediately after officers have interrogated the defendant and conducted their test for sobriety, they charge him with the offense of driving while intoxicated. The denial of counsel at this point makes it impossible for a defendant to have disinterested witnesses observe his condition and to obtain a blood test by a doctor — the only means by which defendant might prove his innocence. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

A defendant's guilt or innocence of driving while intoxicated depends upon whether he is intoxicated at the time of his arrest. His condition then is the crucial and decisive fact to be proven. Permission to communicate with counsel and friends is of no avail if those who come to the jail in response to a prisoner's call are not permitted to see for themselves whether he is intoxicated. In this situation, the right of a defendant to communicate with counsel and friends implies, at the very least, the right to have them see him, observe and examine him, with reference to his alleged intoxication. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

**Trial for Misdemeanors.** — Defendant was not denied his constitutional right to counsel by failure of the trial court to appoint counsel to represent him in the consolidated trial of two misdemeanors, where neither offense was a serious offense, notwithstanding the fact that the maximum punishment for the two offenses could have been seven months. State v. Speights, 12 N.C. App. 32, 182 S.E.2d 204, aff'd, 280 N.C. 137, 185 S.E.2d 152 (1971).

**Juvenile Proceedings.** — In order to comply with due process in a juvenile delinquency proceeding, the right of the juvenile to be represented by an attorney must be considered and an attorney provided or there must be a proper waiver of this right. In re Walker, 14 N.C. App. 356, 188 S.E.2d 731, aff'd, 282 N.C. 28, 191 S.E.2d 702 (1972).

### C. Appointment of Counsel for Indigents.

**It is a cardinal principle of criminal law** that an indigent defendant has the right under U.S. Const., Amend. VI to assistance of counsel for his defense. State v. Luker, 65 N.C. App. 532, 310 S.E.2d 63 (1983), rev'd on other grounds, 65 N.C. App. 644, 316 S.E.2d 309 (1984).

**Prompt appointment of counsel in a capital case is mandatory** and is required by this section. State v. Pearce, 266 N.C. 234, 145 S.E.2d 918 (1966).

**Statute Making Appointment of Counsel for Indigents Discretionary Held Unconstitutional.** — Former G.S. 15-4.1, insofar as it purported to leave to the discretion of the trial judge the appointment of counsel for indigent defendants charged with serious offenses, was unconstitutional. State v. Morris, 275 N.C. 50, 165 S.E.2d 245 (1969).

**The trial judge must make an express finding as to defendant's indigency** or lack of indigency. State v. Pickens, 20 N.C. App. 63, 200 S.E.2d 405 (1973).

Where defendant is charged with a serious crime, it is important for the trial judge to determine in the first instance the question of indigency and for the record to show whether lack of counsel results from indigency or choice. State v. Morris, 275 N.C. 50, 165 S.E.2d 245 (1969).

**Defendant is entitled to a detailed investigation into his economic situation.** State v. Pickens, 20 N.C. App. 63, 200 S.E.2d 405 (1973).

**Absence of Standards.** — The theory that right to counsel has been denied because of absence of definite standards for determining indigency has been rejected by the Court of Appeals. State v. Smith, 27 N.C. App. 379, 219 S.E.2d 277 (1975).

**When Defendant Prejudiced by Insufficient Inquiry.** — Although it was incumbent upon the trial court to make a more sufficient inquiry into defendant's financial status and to determine the question of his indigency, defendant was not prejudiced unless he could show that he did not voluntarily and intelligently waive counsel. State v. Pickens, 20 N.C. App. 63, 200 S.E.2d 405 (1973).

**Denial of counsel without evidence to support a finding of nonindigency entitles defendant to a new trial.** State v. Haire, 19 N.C. App. 89, 198 S.E.2d 31 (1973).

**Indigent Defendant May Waive Right to Counsel.** — The purpose of the statutory provision for appointment of counsel, at public expense, for indigent defendants is to put indigent defendants on an equality with affluent defendants in trials upon criminal charges. To deny, or to restrict the right of the indigent to waive counsel, i.e., to represent himself, while permitting the affluent defendant to exercise such right, has no reasonable relation to the objective of equal opportunity to prevail at the trial of the case. Such classification is beyond the power of the legislature. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

**And May Represent Himself.** — A defendant in a criminal proceeding has a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972); State v. Smith, 24 N.C. App. 498, 211 S.E.2d 539 (1975), overruled on other grounds, State v. Barnes, 324 N.C. App. 539, 380 S.E.2d 118 (1989).

A defendant on the trial of a criminal case, including a coram nobis proceeding at which the defendant is present and witnesses are to be examined and cross-examined, has a right to conduct and manage his own case pro se. The right to act pro se is a right arising out of the federal Constitution and not the mere product of legislation or judicial decision. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

**Defendant appearing pro se by his own choice does so at his peril** and does not automatically become a ward of the court. State v. McDougald, 18 N.C. App. 407, 197 S.E.2d 11, cert. denied, 283 N.C. 756, 198 S.E.2d 726 (1973).

**Court Did Not Err in Refusing to Allow Defendant Represented by Appointed Counsel to Make Pro Se Closing Argument.** — Trial court did not err when it refused to let defendant, who was represented by appointed counsel, make a closing argument to the jury. State v. Forrest, 164 N.C. App. 272, 596 S.E.2d 22, 2004 N.C. App. LEXIS 827 (2004), cert. denied, 359 N.C. 193, 607 S.E.2d 653 (2004), aff'd, — N.C. —, 611 S.E.2d 833 (2005), remanded, Forrest v. North Carolina, 126 S.C. 29777 (U.S. 2006).

**Revocation of Waiver of Appointed Counsel.** — Trial court did not err when the court allowed defendant to be represented by counsel because there was no evidence that the trial court expressly forced appointed counsel on defendant; after defendant voluntarily revoked his waiver of appointed counsel and informed the trial court that he would no longer represent himself but would be represented by his court-appointed attorney, the trial court ensured that representation by the court-appointed attorney was fully defendant's choice before the court appointed defense counsel. State v. Worrell, 190 N.C. App. 387, 660 S.E.2d 183, 2008 N.C. App. LEXIS 855 (2008), appeal dismissed, review denied, 362 N.C. 688, 671 S.E.2d 531 (2008).

**Condition of probation requiring the defendant to reimburse the State** for costs of court-appointed counsel does not infringe upon defendant's constitutional right to counsel. State v. Foust, 13 N.C. App. 382, 185 S.E.2d 718 (1972), overruled on other grounds in State v. Young, 21 N.C. App. 316, 204 S.E.2d 185 (1974).

**Facts Held Insufficient to Sustain Finding of Nonindigency.** — The fact that the defendant was a painter capable of earning $60.00 per week when he was able to obtain work and that he had made little, if any, effort to secure counsel, either privately or by court appointment, was not sufficient to sustain a finding that he was not indigent at the time of trial and, therefore, not entitled to a court-appointed attorney when one was requested at the trial. State v. Haire, 19 N.C. App. 89, 198 S.E.2d 31 (1973).

## V. SELF-INCRIMINATION.

### A. In General.

**Liberal Construction.** — The Constitution ought to be liberally construed to preserve personal rights and protect the citizen against self-incriminating evidence. Smith v. Smith, 116 N.C. 386, 21 S.E. 196 (1895); State v. Medley, 178 N.C. 710, 100 S.E. 591 (1919).

The constitutional guaranties against self-incrimination should be liberally construed. State v. Smith, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

**Right to Remain Silent at All Times.** — The right to remain silent does not arise when an arrestee is given his Miranda warnings. It is a right which he possesses at all times under U.S. Const., Amend. V and under this section. State v. Lane, 46 N.C. App. 501, 265 S.E.2d 493, aff'd, 301 N.C. 382, 271 S.E.2d 273 (1980).

**The constitutional inhibition against**

**self-incrimination is directed against compulsion,** and not against voluntary admissions, confessions, or testimony freely given on the trial. Such statements, confessions, and testimony voluntarily given on a former trial are received against the accused as his admissions. State v. Farrell, 223 N.C. 804, 28 S.E.2d 560 (1944); State v. Sheffield, 251 N.C. 309, 111 S.E.2d 195 (1959).

The privilege against self-incrimination is one against being compelled to testify. It furnishes no protection against the use of testimony which was voluntarily given. State v. Floyd, 246 N.C. 434, 98 S.E.2d 478 (1957).

**A defendant has a right not to be compelled to be a witness against himself** in any criminal case. State v. Wills, 293 N.C. 546, 240 S.E.2d 328 (1977).

**Privilege Protects Against Only Real Dangers.** — The privilege against self-incrimination protects against real dangers, not remote and speculative possibilities, and a witness may not arbitrarily refuse to testify without existence in fact of a real danger, it being for the court to determine whether that real danger exists. Johnson County Nat'l Bank & Trust Co. v. Grainger, 42 N.C. App. 337, 256 S.E.2d 500, cert. denied, 298 N.C. 304, 259 S.E.2d 300 (1979); Shaw v. Williamson, 75 N.C. App. 604, 331 S.E.2d 203, cert. denied, 314 N.C. 669, 335 S.E.2d 496 (1985).

**Court Determines Applicability of Privilege.** — The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself. His say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified and to require him to answer if it clearly appears to the court that he is mistaken. State v. Smith, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

**And Applicability Depends upon the Case.** — If a witness, upon interposing his claim of immunity, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evidenced from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence. State v. Smith, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

**Questions Subjecting Defendant to Punitive Damages.** — This provision protects defendants from being required to answer questions, on an order of examination, which will necessarily tend to subject them to a verdict or an award of punitive damages, and to an execution against the person, the effect of which would be to deprive them entirely of their homestead exemption and of any personal property exemption over fifty dollars. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

**Guaranty Extends to Any Proceedings Sanctioned by Law.** — The constitutional guaranties against self-incrimination are to be liberally construed and they apply not only to criminal prosecutions but to any proceedings sanctioned by law, including examinations before trial. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

The privilege against self-incrimination may be exercised by a witness in any proceeding. State v. Smith, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

The constitutional privilege against self-incrimination applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. Johnson County Nat'l Bank & Trust Co. v. Grainger, 42 N.C. App. 337, 256 S.E.2d 500, cert. denied, 298 N.C. 304, 259 S.E.2d 300 (1979).

**Civil Actions Involving Arrest, Imprisonment or Execution Against the Person.** — The constitutional protection against self-incrimination extends to civil actions that subject one to arrest, imprisonment or execution against the person. Shaw v. Williamson, 75 N.C. App. 604, 331 S.E.2d 203, cert. denied, 314 N.C. 669, 335 S.E.2d 496 (1985).

**Privilege Extends to Pleading Stage of Civil Action for Punitive Damages.** — A defendant may plead his privilege against self-incrimination in a civil action where the plaintiff asks for punitive damages, and the privilege applies to protect a party from self-incrimination at the pleadings stage of an action. Therefore, in an action to recover compensatory and punitive damages for alienation of affections and criminal conversation, where defendant refused to answer the allegations of plaintiff's complaint claiming his constitutional privilege against self-incrimination, the trial court erred in deeming the allegations as admitted pursuant to G.S. 1A-1, Rule 8(d). Byrd v. Hodges, 44 N.C. App. 509, 261 S.E.2d 269 (1980).

**Refusal to Answer Interrogatories in Civil Action for Punitive Damages.** — Fact that a plaintiff seeks punitive damages does not, ipso facto, entitle defendant to refuse, with impunity, to submit to requested discovery, where the responses, whether individually or collectively, would not necessarily tend to subject defendant to a punitive damages award. Stone v. Martin, 56 N.C. App. 473, 289 S.E.2d 898, cert. denied and appeal dismissed, 306 N.C. 392, 294 S.E.2d 220 (1982).

In a wrongful death action, defendant faced no peril of being subject to execution against the person for not satisfying a judgment for punitive damages, as there was no allegation in the complaint that would support the required statutory findings for execution against the person. Therefore, there was no basis for defendant declining to answer interrogatories on the grounds of self-incrimination. Shaw v. Williamson, 75 N.C. App. 604, 331 S.E.2d 203, cert. denied, 314 N.C. 669, 335 S.E.2d 496 (1985).

In a wrongful death action, defendant could not have incriminated himself criminally by answering certain interrogatories, because, based on the same incident referred to in the complaint, he was charged with death by vehicle and driving while intoxicated, pled guilty, and complied with the judgments entered on the convictions. Shaw v. Williamson, 75 N.C. App. 604, 331 S.E.2d 203, cert. denied, 314 N.C. 669, 335 S.E.2d 496 (1985).

**Scope of Protection.** — The fair interpretation of the clause that the defendant "shall not be compelled to give evidence against himself" seems to be to secure one who is or may be accused of crime from making any compulsory revelations which may be given in evidence against him on his trial for the offense. LaFontaine v. Southern Underwriters Ass'n, 83 N.C. 132 (1880).

**Admissions Tending to Incriminate.** — The protection against self-incrimination is not limited to admissions that would subject a witness to criminal prosecution; the privilege also extends to admissions that may only tend to incriminate. State v. Smith, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

**Links in Chain of Evidence.** — The privilege afforded against self-incrimination extends not only to answers that would in themselves support a conviction under a criminal statute, but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a crime. State v. Smith, 13 N.C. App. 46, 184 S.E.2d 906 (1971). See also, Smith v. Smith, 116 N.C. 386, 21 S.E. 196 (1895).

The protection afforded by the privilege against self-incrimination does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution. Johnson County Nat'l Bank & Trust Co. v. Grainger, 42 N.C. App. 337, 256 S.E.2d 500, cert. denied, 298 N.C. 304, 259 S.E.2d 300 (1979).

**Silence in Face of Accusation of Guilt.** — Defendant's silence in face of an accusation of guilt cannot be competent as an implied admission when the accusation is made during interrogation of defendant by officers of the law. To compel defendant to reply to an accusation under such circumstances on pain of having his silence considered against him would amount to an infringement of his constitutional right not to be compelled to incriminate himself. State v. Fuller, 270 N.C. 710, 155 S.E.2d 286 (1967).

Defendant's silence in the rightful exercise of his privilege against self-incrimination may not be considered an admission of the truth of incriminating statements made in defendant's presence by a prospective State's witness in response to an officer's questions. State v. Castor, 285 N.C. 286, 204 S.E.2d 848 (1974).

If police officers properly warn an accused of his constitutional rights, his silence may not be used against him. State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975).

Where an arrestee is the focus of suspicion, has been held in custody for a significant period of time without being advised of his Miranda rights, is aware of his right to remain silent, and makes it clear that he is relying on his right to remain silent, his in-custody silence in the face of accusation and possible prosecution cannot be the subject of cross-examination. State v. Lane, 46 N.C. App. 501, 265 S.E.2d 493, aff'd, 301 N.C. 382, 271 S.E.2d 273 (1980).

**Where police officers told defendant that anything he said, or did not say,** in response to statements made by an eyewitness could be used for or against him, their warning violated the provision of this section, which requires that no person charged with crime shall be compelled to give self-incriminating evidence. State v. Fuller, 270 N.C. 710, 155 S.E.2d 286 (1967).

**Necessity of Advising Defendant of Rights Where Significantly Deprived of Freedom.** — When an officer told defendant that he would get a warrant for him and would leave an officer at defendant's home until the warrant could be procured, defendant was deprived of his freedom in a significant way; it was therefore necessary to advise him of his rights before his answer to the question as to how long he had been at his home could be introduced into evidence. State v. Hoyle, 325 N.C. 232, 382 S.E.2d 752 (1989).

**As to admissibility of in-custody silence for purpose of impeachment,** see State v. Williams, 288 N.C. 680, 220 S.E.2d 558 (1975).

**Defendant's failure to testify may not be considered an admission** of the truth of testimony which tends to incriminate him. State v. Castor, 285 N.C. 286, 204 S.E.2d 848 (1974); State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975).

**Adverse comments on defendant's failure to testify are impermissible.** State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975).

Defendant was entitled to a new trial because the trial court erroneously overruled his objection to the prosecution's closing comments about defendant's decision not to testify in trial for felonious breaking or entering. The error was prejudicial and required a new trial. State v. Reid, 334 N.C. 551, 434 S.E.2d 193 (1993).

Defendant's Fifth Amendment and N.C. Const., Art I, § 23 rights were violated where the prosecutor's statements referred repeatedly to defendant's silence, not merely to his behavior, and clearly urged the jury to infer that defendant was sane enough to know that remaining silent was in his best interest; the error was not harmless beyond a reasonable doubt as the only real issue was whether defendant was legally insane at the time of the murder, three mental health experts testified that they believed defendant was legally insane, and lay witnesses and circumstances presented the only evidence of defendant's sanity. State v. Durham, 175 N.C. App. 202, 623 S.E.2d 63, 2005 N.C. App. LEXIS 2752 (2005).

**But May Be Harmless.** — The prosecutor's improper, slightly veiled, indirect comment on defendant's failure to testify was harmless beyond a reasonable doubt. State v. Mitchell, 353 N.C. 309, 543 S.E.2d 830, 2001 N.C. LEXIS 265 (2001), cert. denied, 534 U.S. 1000, 122 S. Ct. 475, 151 L. Ed. 2d 389 (2001).

**But, trial court did not err in allowing police officer's comments on murder defendant's decision to exercise her constitutional right to remain silent** upon her arrest; the comments were elicited by the defense counsel and defense counsel repeatedly asked officer to explain his answers and did not object to, or move to strike the comments. State v. Jennings, 333 N.C. 579, 430 S.E.2d 188 (1993), cert. denied, 510 U.S. 1028, 114 S. Ct. 644, 126 L. Ed. 2d 602 (1994).

**And statements made by prosecutor regarding the demeanor of the defendant** was not comparable to statements previously held to be improper comments on a defendant's failure to testify. State v. Bates, 343 N.C. 564, 473 S.E.2d 269 (1996), cert. denied, 519 U.S. 1131, 117 S. Ct. 992, 136 L. Ed. 2d 873 (1997).

**Prosecutor Impermissibly Commented on Defendant's Silence.** — State's cross-examination of defendant, examination of the officer, and closing argument attacked defendant's exercise of his right against self-incrimination in such a manner as to leave a strong inference with the jury that part of defendant's testimony was an after-the-fact creation; the prosecutor impermissibly commented on defendant's silence in violation of his rights under the North Carolina and federal constitutions. State v. Shores, 155 N.C. App. 342, 573 S.E.2d 237, 2002 N.C. App. LEXIS 1597 (2002).

**Misstatement of Silence Jury Instruction.** — The defendant's rights under this section were not violated by the trial court's misstatement that the defendant's failure to testify "creates into presumption against him" where the court went on to state, "therefore, his silence in this case is not to influence your decision in any way." State v. Hardy, 353 N.C. 122, 540 S.E.2d 334, 2000 N.C. LEXIS 902 (2000), cert. denied, 534 U.S. 840, 122 S. Ct. 96, 151 L. Ed. 2d 56 (2001).

**Right to Remain Silent Not Violated.** — Where the State did not ask detective whether defendant exercised his right to remain silent, he only testified that defendant was read his rights and indicated he understood those rights and no specific inquiry or argument was made about defendant's silence, defendant's exercise of his right to remain silent therefore was not used against him and his constitutional rights were not violated. State v. Carter, 335 N.C. 422, 440 S.E.2d 268 (1994).

Where the prosecutor was directly responding to argument made by defendant relating to a specific piece of evidence and the argument did not relate to whether defendant himself sought to testify, it simply constituted a misstatement regarding the parties' relative rights to introduce the statement, not a comment on defendant's failure to testify. State v. Ratliff, 341 N.C. 610, 461 S.E.2d 325 (1995).

Defendant's right to remain silent under this section was not violated by the State's reference to his failure to assert his self-defense when he made spontaneous inculpatory statements prior to his arrest, nor by its reference to his post-arrest silence. State v. Washington, 141 N.C. App. 354, 540 S.E.2d 388, 2000 N.C. App. LEXIS 1405 (2000), cert denied, 353 N.C. 396, 547 S.E.2d 427 (2001).

Trial court's curative instruction to the jury following the prosecutor's comment at trial was sufficient, even though not made immediately after the prosecutor's comments, as the the trial court stated that the comment was improper, and the statement was followed by an instruction to the jury not to consider the failure of the accused to offer the accused as a witness. State v. Kemmerlin, 356 N.C. 446, 573 S.E.2d 870, 2002 N.C. LEXIS 1260 (2002).

Testimony that defendant declined to answer questions after he was arrested was harmless error because (1) the prosecutor did not solicit the testimony, which was offered in response to a question asking for a chronology of events surrounding defendant's arrest, (2) no further reference was made during the trial to defendant asserting his post-arrest right to remain silent, and (3) there was strong circumstantial evidence establishing defendant's guilt. State v. Bailey, 157 N.C. App. 80, 577 S.E.2d 683, 2003 N.C. App. LEXIS 377 (2003).

Trial court did not err by allowing a detective to testify that defendant refused to make a statement to police because defendant did not object to that testimony during trial; in addition, the trial court did not have an obligation to give the jury a curative instruction, sua sponte, after a witness who testified stated during cross-examination that if defendant didn't agree with what the witness said, defendant should defend himself. State v. Batchelor, 157 N.C. App. 421, 579 S.E.2d 422, 2003 N.C. App. LEXIS 739 (2003).

Trial court did not violate defendant's right to remain silent where the police detective testified that defendant was quiet during questioning and often refused to respond to questions, and where the prosecutor referred to this testimony during closing arguments; the detective was asked about defendant's demeanor during questioning, not defendant's exercise of the right to remain silent, as defendant had waived defendant's Miranda rights and had agreed to speak with the detective. State v. Lyles, 172 N.C. App. 323, 615 S.E.2d 890, 2005 N.C. App. LEXIS 1424 (2005), appeal dismissed, 360 N.C. 73, 622 S.E.2d 625 (2005).

Where a prosecutor, during cross-examination in a second-degree murder trial, questioned defendant on the reason for omitting from a voluntary discussion with a deputy such important facts as that the victim had been drunk, was possibly on cocaine, and had threatened defendant's life several times prior to the shooting, defendant's right to remain silent was not violated, because the cross-examination questions did not constitute an impermissible comment upon the invocation of the right, and any error was harmless. State v. Ezzell, 182 N.C. App. 417, 642 S.E.2d 274, 2007 N.C. App. LEXIS 695 (2007), cert. denied, appeal dismissed, 361 N.C. 432, 649 S.E.2d 390 (2007).

**Comment on Prior Silence After Defendant Takes Stand.** — With or without a *Miranda* warning, a defendant's right to remain silent is guaranteed by U.S. Const., Amend. V, as well as by this section. Any comment upon the exercise of this right, nothing else appearing, is impermissible. However, when a defendant chooses to testify in his own behalf, his U.S. Const., Amend. V right to remain silent must give way to the State's right to seek to determine, by way of impeachment, whether his prior silence is inconsistent with his trial testimony. The test is whether, under the circumstances at the time of arrest, it would have been natural for defendant to have asserted the same defense asserted at trial. State v. McGinnis, 70 N.C. App. 421, 320 S.E.2d 297 (1984).

**Argument on Failure to Tell Police of Defense.** — District attorney's question and argument to the jury as to defendant's failure to tell the police of his defense were prejudicial errors; since there was no eyewitness to the shooting other than defendant, and since his defense depended on the jury's acceptance of his version of the event, the State failed to demonstrate beyond a reasonable doubt that it was harmless to attack the credibility of his version by improper evidence, which improper evidence was reinforced by jury argument. State v. Hoyle, 325 N.C. 232, 382 S.E.2d 752 (1989).

**Truth or Falsity of Statements.** — The constitutional privilege against self-incrimination bars the introduction of all statements falling within its scope, without regard for their truth or falsity. State v. Rogers, 233 N.C. 390, 64 S.E.2d 572 (1951), overruled on other grounds, State v. Silver, 286 N.C. 709, 213 S.E.2d 247 (1975).

**Forced Production of Incriminating Documents.** — The protection afforded to defendants in criminal action by this section is a matter of absolute right to them, and extends to the forced production of letters and other papers in their possession that may tend to incriminate them upon the trial. State v. Hollingsworth, 191 N.C. 595, 132 S.E. 667 (1926).

The introduction in evidence of incriminating papers taken from the defendant at the time of the arrest does not infringe the constitutional guarantee against self-incrimination, under this section, and when he takes the stand in his own behalf he waives his constitutional right against self-incrimination. State v. Shoup, 226 N.C. 69, 36 S.E.2d 697 (1946), distinguishing State v. Hollingsworth, 191 N.C. 595, 132 S.E. 667 (1926).

Although the constitutional privilege against self-incrimination applies to the production of papers, so that if the accused is compelled to produce them the privilege is violated, lawful seizure of such evidence (as, for example, pursuant to a valid search warrant) obviously differs from requiring the accused to produce it and does not violate the privilege. State v. Downing, 31 N.C. App. 743, 230 S.E.2d 581 (1976).

**Inapplicability of Privilege to Physical Evidence.** — The scope of the privilege against self-incrimination, in history and in principle, includes only the process of testifying by word of mouth or in writing, i.e., the process of disclosure by utterance. It has no application to such physical evidential circumstances as may exist on the accused's body or about his person. State v. Strickland, 276 N.C. 253, 173 S.E.2d 129 (1970).

The scope of the privilege against self-incrimination includes only the process of testifying by word of mouth or in writing. It has no application to such physical, evidential circumstances as may exist on the accused's body or about his person. State v. Rogers, 233 N.C. 390, 64 S.E.2d 572 (1951), overruled on other grounds, State v. Silver, 286 N.C. 709, 213 S.E.2d 247 (1975); State v. Paschal, 253 N.C. 795, 117 S.E.2d 749 (1961).

The constitutional guarantee that a defendant shall not be compelled to testify against himself, as provided by this section, does not preclude testimony by a witness as to marks on defendant's body tending to identify him as the perpetrator of the crime. State v. Riddle, 205 N.C. 591, 172 S.E. 400 (1934); State v. Floyd, 246 N.C. 434, 98 S.E.2d 478 (1957).

The admission of incriminating testimony of defendant's physical condition by witnesses who examined her without objection did not violate defendant's constitutional right not to be compelled to give evidence against herself, as provided in this section. State v. Eccles, 205 N.C. 825, 172 S.E. 415 (1934).

Upon trial of defendant for violating the prohibition law, the introduction into evidence of testimony of the officer making the arrest that he found a half-gallon jar of liquor on the person of the defendant was competent, and was not in violation of the constitutional provision that a defendant may not be compelled to give evidence against himself, the provision not applying to physical facts or conditions. State v. Hickey, 198 N.C. 45, 150 S.E. 615 (1929).

**Identifying Physical Characteristics.** — Handwriting samples, blood samples, fingerprints, clothing, hair, voice demonstrations, even the body itself, are identifying physical characteristics and are outside the protection of the privilege against self-incrimination. State v. Greene, 12 N.C. App. 687, 184 S.E.2d 523 (1971), appeal dismissed, 280 N.C. 303, 186 S.E.2d 177 (1972).

**Distinguishing Marks.** — Where witnesses for the State had testified as to a small scar near the culprit's left eye, a small mole on his left ear, and gold fillings in his teeth, upon return of the jury into the courtroom in disagreement as to defendant's identity as the culprit, the court did not commit prejudicial error in permitting a juror, with defendant's consent, to examine defendant's body for the distinguishing marks. State v. Floyd, 246 N.C. 434, 98 S.E.2d 478 (1957).

**Chemical analyses of blood or breath** are not within the protection of U.S. Const., Amends. V and XIV, or this section, as such chemical analyses are not evidence which is testimonial or communicative in nature. State v. White, 84 N.C. App. 111, 351 S.E.2d 828, cert. denied, 319 N.C. 227, 353 S.E.2d 404, appeal dismissed, 319 N.C. 409, 354 S.E.2d 887 (1987).

**Blood and Urine Tests.** — Where defendant pleaded insanity at the time of the homicide due to the continued use of liquor and opiates, and the record failed to show any compulsion on the part of the officers in obtaining specimens of defendant's blood and urine in order to ascertain the presence or absence of alcohol or morphine in his system, it was held that defendant's contention that the obtaining of the specimens compelled him to give evidence against himself, in violation of this section, was untenable. State v. Cash, 219 N.C. 818, 15 S.E.2d 277 (1941).

Expert testimony as to the results of a test of defendant's blood is admissible on the trial of a charge of driving a motor vehicle upon the public highways within the State while under the influence of intoxicating beverages. State v. Willard, 241 N.C. 259, 84 S.E.2d 899 (1954).

Admission of evidence of a defendant's refusal to submit to a chemical test designed to measure the alcoholic content of his blood does not violate his constitutional right against self-incrimination. State v. Strickland, 276 N.C. 253, 173 S.E.2d 129 (1970).

**Examination of Clothing.** — No constitutional rights were invaded when an officer required defendant, who was accused of rape, to surrender for examination and analysis the clothing worn by him at the time the crime was alleged to have been committed. State v. Gaskill, 256 N.C. 652, 124 S.E.2d 873 (1962); State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968), cert. denied, 393 U.S. 1087, 89 S. Ct. 876, 21 L. Ed. 2d 780 (1969).

**Evidence of Footprints.** — The constitutional privilege against self-incrimination is not violated by the introduction of evidence of footprints to identify the accused, even where these are obtained by coercion. State v. Rogers, 233 N.C. 390, 64 S.E.2d 572 (1951), overruled on other grounds, State v. Silver, 286 N.C. 709, 213 S.E.2d 247 (1975).

**Photographs.** — The admission of the photograph of a lineup including the defendant was not violative of his rights under this section or N.C. Const., Art. I, § 19, where the photograph was properly identified and entered into evidence for the purpose of illustrating the testimony of a witness, and, although the defendant objected to the questions identifying the picture, he did not ask that its admission be restricted. State v. McKissick, 271 N.C. 500, 157 S.E.2d 112 (1967).

**Motion Pictures.** — Motion pictures of an accused in a criminal action are not per se testimonial in nature, and, where they are properly used to illustrate competent and relevant testimony of a witness, their use does not violate accused's privilege against self-incrimination. State v. Strickland, 276 N.C. 253, 173 S.E.2d 129 (1970).

When a sound motion picture contains incriminating statements by the defendant made from his knowledge of the offense upon defendant's objection, the judge must conduct a voir dire to determine the admissibility of the in-custody statements or admissions contained in the sound picture. State v. Strickland, 276 N.C. 253, 173 S.E.2d 129 (1970).

**Demonstration of Act of Killing.** — Upon trial for murder in the first degree, where there is other circumstantial evidence of the prisoner's guilt, it is not duress to require the prisoner to place himself in such position as to show that he could have fired the fatal shot from a window and killed the deceased, as this is not considered as making a person furnish evidence against himself, it being dependent upon physical facts and conditions and not upon confessions or statements of the prisoner. State v. Thompson, 161 N.C. 238, 76 S.E. 249 (1912).

**Positioning of Defendant for Purpose of Identification.** — Testimony that defendant was placed for identification in the relative position to a witness as the perpetrator was seen by her just before committing a criminal offense is not objectionable as forcing defendant to give evidence against himself in denial of his constitutional rights. State v. Neville, 175 N.C. 731, 95 S.E. 55 (1918).

**Who Is Protected.** — Immunity from self-incrimination extends not only to one who actually testifies as a witness, but also to the defendant in the trial, even if he declines to testify as a witness in his own behalf. State v. Hollingsworth, 191 N.C. 595, 132 S.E. 667 (1926).

**The privilege against self-incrimination can be claimed only by the witness,** and when it is claimed, it is guaranteed by U.S. Const., Amend. V, as well as by this section. State v. Smith, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

**A defendant who chooses to testify waives his privilege** against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him. State v. Wills, 293 N.C. 546, 240 S.E.2d 328 (1977).

The defendant waives his constitutional privilege not to answer questions tending to incriminate himself when he voluntarily testifies in his own behalf. State v. Allen, 107 N.C. 805, 11 S.E. 1016 (1890).

Whenever the defendant in a criminal action voluntarily testifies in his own defense he assumes the position of a witness and subjects himself to all the disadvantages of that position. In doing so, he acknowledges the right of the prosecution to test his credibility and he waives his constitutional privilege not to answer questions which tend to incriminate him or to prove the specific offense with which he is charged. State v. O'Neal, 187 N.C. 22, 120 S.E. 817 (1924).

**Defendant was tricked or cajoled into waiving his right** to counsel and his privilege against self-incrimination, and his statements to a State Bureau of Investigation agent therefore were not voluntary, where the evidence tended to show that defendant and his attorney went to SBI headquarters in Raleigh for defendant to be given a polygraph examination; defendant and his attorney were told that the examination would consist of the polygraph test itself and an interrogation; they were also told that the attorney could not be present during the test phase but that he would be allowed to be present during the interrogation phase; contrary to this advice, defendant's attorney was left outside the examination room during the test and the interrogation; the attorney, who could neither see nor hear what was transpiring, thought the testing phase was still in progress, and defendant himself apparently assumed that his lawyer would be admitted to the room at the proper time. State v. Stephens, 300 N.C. 321, 266 S.E.2d 588 (1980).

**Defendant Testifying May Be Cross-Examined on In-Custody Statements.** — A trial court may properly allow the prosecuting attorney to cross-examine defendant with reference to in-custody statements for the purpose of impeaching defendant's trial testimony, notwithstanding the fact that defendant was not represented by counsel and had not waived the right to counsel when the statements were made. State v. Nobles, 14 N.C. App. 340, 188 S.E.2d 600, cert. denied, 281 N.C. 626, 190 S.E.2d 472 (1972).

Defendant's privilege against self-incrimination was not violated where State was permitted to show for purposes of impeachment that defendant had not voluntarily turned himself in to the police after defendant had already testified to the contrary. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

The prosecutor's impeachment of defendant by cross-examining him about his failure to tell officers, while making an in-custody statement, that he was acting to protect himself from attack when he shot deceased did not violate defendant's constitutional rights. State v. Haith, 48 N.C. App. 319, 269 S.E.2d 205, appeal dismissed and cert. denied, 301 N.C. 403, 273 S.E.2d 449 (1980).

In a capital murder case where defendant claimed to have been present when another person killed the victim, it was not improper for the State to cross-examine defendant as to defendant's failure, in post-arrest statements, to reveal the identity of the other person. State v. Fair, 354 N.C. 131, 552 S.E.2d 568, 2001 N.C. LEXIS 944 (2001).

**Questions About Prior Convictions on Cross-Examination.** — Defendant's testimony on cross-examination about an additional conviction for assault with a firearm which he had failed to mention during his direct examination was relevant impeachment evidence; thus, it was not only proper but also prudent for the prosecutor to attempt to elicit further details about defendant's prior convictions. State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980).

**Failure to Disclose Alibi Defense Prior to Trial Not an Inconsistent Prior State-**

**ment for Cross-Examination Purposes.** — In a prosecution of defendant for possession and sale of heroin, where defendant was arrested and taken to a police station, indictments were read to him, and defendant interrupted the reading to state that he had not sold heroin to the person named in the indictments, defendant's failure to disclose his alibi defense to the police officers then, or to some other person prior to trial, did not amount to an inconsistent statement in light of his in-court testimony relative to an alibi, and the district attorney's cross-examination of defendant concerning failure to disclose his alibi was sufficiently prejudicial to warrant a new trial. State v. Lane, 301 N.C. 382, 271 S.E.2d 273 (1980).

**Accomplice Could Not Refuse to Answer on Cross-Examination After Incriminating Defendant.** — An accomplice could not testify on direct examination to facts tending to incriminate defendant and at the same time refuse to answer questions on cross-examination relating to matters embraced in his examination-in-chief, and where he refused to answer relevant questions on cross-examination on the ground that his answers might tend to incriminate him, it was error for the court to refuse defendant's motion that his testimony-in-chief be stricken from the record, the refusal to answer the questions on cross-examination rendering the testimony-in-chief incompetent. State v. Perry, 210 N.C. 796, 188 S.E. 639 (1936).

**Defendant who, prior to his own indictment, gave testimony at codefendant's continuance hearing,** placing himself in the company of the prosecuting witness on the evening in question, was not denied his privilege against self-incrimination, even though he was not represented by counsel or informed of his right against compulsory self-incrimination, despite the fact that codefendant's attorney, who had sought his testimony, was acting with the full complicity of the State, as defendant was not compelled to speak to his detriment. State v. Flowers, 318 N.C. 208, 347 S.E.2d 773 (1986).

**Pre-arrest warrantless recording of defendant's incriminating statements through witness** did not violate defendant's right to be free of unreasonable search and seizure under N.C. Const., Art. I, § 20, inasmuch as defendant had no legitimate expectation of privacy regarding a conversation he voluntarily maintained with a confederate; the recording did not violate defendant's right under this section to be free from compulsory self-incrimination because his participation in the conversation was wholly voluntary, albeit ill-advised, and did not violate defendant's right under this section to counsel because the conversation in question occurred during the initial investigation of defendant prior to his arrest. State v. Levan, 326 N.C. 155, 388 S.E.2d 429 (1990).

**Right Not Violated.** — Defendant's alleged "Hobson's choice" between asserting her privilege against self-incrimination and her right to testify on her own behalf was illusory where trial court's denial of defendant's motion for a continuance in noncapital indictment for murder of stepson did not force defendant to choose between two constitutional rights but to make a purely tactical decision as to whether it would be more advantageous to testify in this trial, in her capital trial, in both trials, or not at all; defendant would have faced the same dilemma regardless of which case was tried first since any incriminating statements made at the first trial could later be used against her at the second trial. State v. White, 340 N.C. 264, 457 S.E.2d 841 (1995).

Defendant's motion to suppress incriminating statements made by him to a police officer while evidence was being presented during voir dire was properly denied since the statements made by defendant were spontaneous and did not warrant a conclusion that the officer should have known that he was about to elicit an incriminating statement from defendant by responding "so do I" when defendant commented he knew where a baseball cap had come from that was being presented as evidence; defendant's constitutional rights were not violated, because the officer's conduct did not constitute interrogation and no Miranda warning was required. State v. Jackson, 165 N.C. App. 763, 600 S.E.2d 16, 2004 N.C. App. LEXIS 1509 (2004).

**Affidavit on Motion to Suppress.** — Section 15A-977(a) requires an affidavit for a motion to suppress, but requiring the affidavit does not amount to compelling defendant to be a witness against himself in a criminal case in violation of U.S. Const., Amend. V and this section. State v. Gibson, 32 N.C. App. 584, 233 S.E.2d 84 (1977).

**Miranda Not Applicable to Abuse and Neglect Proceedings.** — In case involving termination of parental rights, admission of mother's confession to injuring her child was not a violation of her Miranda rights; Miranda does not apply to civil juvenile abuse and neglect proceedings. In re Pittman, 149 N.C. App. 756, 561 S.E.2d 560, 2002 N.C. App. LEXIS 303 (2002), cert. denied, 538 U.S. 982, 123 S. Ct. 1799, 155 L. Ed. 2d 673 (2003).

**Compelling Admission as Condition for Release Pending Appeal.** — Trial court erred by denying a juvenile's release while his appeal was pending in part because he refused to admit committing the offenses for which he was adjudicated delinquent; compelling such an admission to win release violated the juvenile's self-incrimination privilege under the state and federal constitutions. In re Lineberry, 154 N.C.

App. 246, 572 S.E.2d 229, 2002 N.C. App. LEXIS 1456 (2002).

**Exclusionary Rule Held Not To Apply To Evidence Obtained As Result of Faulty Confession.** — Physical evidence obtained due to defendant's statements to police as to the location of the victim's body, obtained in violation of defendant's Miranda and Edwards rights, was not fruit of the poisonous tree and did not have to be suppressed under the exclusionary rule. State v. Goodman, 165 N.C. App. 865, 600 S.E.2d 28, 2004 N.C. App. LEXIS 1521 (2004), cert. denied, 359 N.C. 193, 607 S.E.2d 655 (2004).

### B. Confessions.

**When Confession Is Admissible.** — An extrajudicial confession by an accused is admissible against him when it is voluntarily given and is not induced by threats or fear, and when the defendant has knowingly and intelligently waived his right to have counsel present at the time the confession is given. State v. Ferrell, 46 N.C. App. 52, 264 S.E.2d 134 (1980).

First degree felony murder and conspiracy to commit robbery with dangerous weapon convictions were affirmed since the trial court's decision to admit a videotape of the defendant's post-Miranda interrogation was properly based on substantial evidence that he (1) signed a waiver of, and (2) never made a clear, unambiguous, and unequivocal assertion of his right to counsel, and did not assert his right to remain silent. State v. Ash, 169 N.C. App. 715, 611 S.E.2d 855, 2005 N.C. App. LEXIS 809 (2005), cert. denied, appeal dismissed, 360 N.C. 66, 621 S.E.2d 878 (2005).

**Inadmissibility of Involuntary Confessions or Incriminating Statements.** — Although Miranda warnings are required only when defendant is being subjected to custodial interrogation and are not required during the investigatory stage when defendant is not in custody at the time he makes the statement, all involuntary confessions or incriminating statements, made in custody or out, are ordinarily inadmissible for any purpose. State v. Stephens, 300 N.C. 321, 266 S.E.2d 588 (1980).

**Exclusion of Second Confession After Improper First Confession.** — Neither section 19 nor this section of N.C. Const., Art. I required the suppression of a defendant's second confession, made after proper warnings and the defendant's voluntary waiver of his constitutional rights, when that confession followed an earlier confession which had to be excluded under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). State v. Hicks, 333 N.C. 467, 428 S.E.2d 167 (1993), overruled in part on other grounds, State v. Buchanan, 353 N.C. 332, 543 S.E.2d 823 (2001).

**Plea of Guilty.** — If a plea of guilty or nolo contendere is sustained, it must appear affirmatively that it was entered voluntarily and understandingly. State v. Ford, 281 N.C. 62, 187 S.E.2d 741 (1972).

**Procedural safeguards effective to secure the privilege against self-incrimination are necessary** whenever law-enforcement officers question a person who has been taken into custody or otherwise deprived of his liberty in any significant way. State v. Pruitt, 286 N.C. 442, 212 S.E.2d 92 (1975).

**The ultimate test of the admissibility of a confession** still remains whether the statement made by the accused was in fact voluntarily and understandingly made. State v. Pruitt, 286 N.C. 442, 212 S.E.2d 92 (1975); State v. Garnett, 24 N.C. App. 489, 211 S.E.2d 519, appeal dismissed, 287 N.C. 262, 215 S.E.2d 622 (1975); State v. Stephens, 300 N.C. 321, 266 S.E.2d 588 (1980).

Every statement made by a person in custody as a result of an illegal arrest is not ipso facto involuntary and inadmissible, but the facts and circumstances surrounding such arrest and the in-custody statement should be considered in determining whether the statement is voluntary and admissible. Voluntariness remains as the test of admissibility. State v. Moore, 275 N.C. 141, 166 S.E.2d 53 (1969).

Admissibility depends upon whether the statement was freely and voluntarily made and whether the officers who elicited the statement employed appropriate procedural safeguards. State v. Stephens, 300 N.C. 321, 266 S.E.2d 588 (1980).

**Question of voluntariness must be determined by the total circumstances of each particular case.** State v. Stephens, 300 N.C. 321, 266 S.E.2d 588 (1980); State v. Leak, 90 N.C. App. 351, 368 S.E.2d 430 (1988).

If the totality of circumstances indicates that defendant was threatened, tricked, or cajoled into a waiver of his rights, his statements are rendered involuntary as a matter of law. State v. Stephens, 300 N.C. 321, 266 S.E.2d 588 (1980).

In determining whether a defendant's statement was in fact voluntarily and understandingly made, the court must consider the totality of the circumstances of the case and may not rely upon any one circumstance standing alone and in isolation. State v. Richardson, 70 N.C. App. 509, 320 S.E.2d 900 (1985), rev'd on other grounds, 316 N.C. 594, 342 S.E.2d 823 (1986).

Where defendant asserted that he had not slept nor eaten during the two days prior to his arrest, but failed to show by convincing evidence that he was impaired, intoxicated or coerced at the time he made statements to the police, the trial court did not commit reversible error by admitting defendant's statements into evidence. State v. Cheek, 351 N.C. 48, 520

S.E.2d 545, 1999 N.C. App. LEXIS 1158 (1999), cert. denied, 530 U.S. 1245, 120 S. Ct. 2694, 147 L. Ed. 2d 965 (2000).

Defendant's motion to suppress post-arrest inculpatory statements was properly denied in his trial for first-degree murder and for robbery with a dangerous weapon where the totality of the circumstances indicated that defendant had voluntarily made the statements, that his waiver of his Miranda rights was voluntary, intelligent, and knowingly made, that he never asked for counsel, that the conditions of the interview were of a non-coercive nature, that he was not on any substance or in need of food or bathroom breaks, and the fact that he had subnormal mental capacity did not, alone, render the statement incompetent; accordingly, there was no violation of his rights under this section and suppression of his statements was not required. State v. Mahatha, 157 N.C. App. 183, 578 S.E.2d 617, 2003 N.C. App. LEXIS 539 (2003), cert. denied, 357 N.C. 466, 586 S.E.2d 773 (2003).

**Mental Condition as a Factor.** — Though defendant's mental condition is a factor to be considered, that factor standing alone will not render an otherwise voluntary confession inadmissible. State v. Leak, 90 N.C. App. 351, 368 S.E.2d 430 (1988).

Where defendant contended that the four and one-half hour delay in taking him before a judicial official after service of warrants was a coercive factor which rendered his confession involuntary, but he did not show any causal connection between the confession and the delay, no constitutional provision required exclusion of his statement on this ground. State v. Leak, 90 N.C. App. 351, 368 S.E.2d 430 (1988).

**A confession obtained by the slightest emotions of hope or fear** ought to be rejected. State v. Richardson, 70 N.C. App. 509, 320 S.E.2d 900, rev'd on other grounds, 316 N.C. 594, 342 S.E.2d 823 (1986).

**Effect of Miranda Warnings.** — The fact that the technical procedural requirements of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966) are demonstrated by the prosecution does not, standing alone, control the question of whether a confession was voluntarily and understandingly made, but the answer to this question must be found from a consideration of the entire record. State v. Pruitt, 286 N.C. 442, 212 S.E.2d 92 (1975).

**Custodial admonitions to an accused by police officers** to tell the truth, standing alone, do not render a confession inadmissible. State v. Pruitt, 286 N.C. 442, 212 S.E.2d 92 (1975).

**Intoxication when Confession Is Made.** — Where a defendant pleads drunkenness as a bar to the admissibility of his confession, unless defendant's intoxication amounts to mania — that is, unless he is so drunk as to be unconscious of the meaning of his words — his intoxication does not render inadmissible his confession of facts tending to incriminate him. The extent of his intoxication when the confession was made, however, is a relevant circumstance bearing upon its credibility, and is a question exclusively for the jury's determination. State v. McClure, 280 N.C. 288, 185 S.E.2d 693 (1972); State v. Williams, 289 N.C. 439, 222 S.E.2d 242, death sentence vacated, 429 U.S. 809, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976).

Defendant claimed his Miranda waiver and confessions were affected by alcohol and precription drugs; the voluntariness of his Miranda waiver and confessions were supported by an officer's testimony that the defendant was attentive and very coherent and very understanding when he was read his Miranda rights. State v. Tuck, 173 N.C. App. 61, 618 S.E.2d 265, 2005 N.C. App. LEXIS 1930 (2005).

**Intoxication Held Not to Preclude Conclusion of Voluntariness.** — Where officers did not begin questioning defendant until some two hours after a blood alcohol test, and one officer explicitly testified that defendant appeared sober during the interview and spoke rationally and coherently, and the trial court specifically found that defendant was not under the influence of alcohol during the interview, the fact that defendant may have experienced some lingering, mild intoxication at the time of the confession did not preclude the conclusion that he confessed voluntarily. State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988), death sentence vacated and remanded on other grounds, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

**Confession Held Voluntary.** — The granting of defendant's request to see his girlfriend and the mother of his child did not render his confession involuntary where the investigators's statements that they would attempt to contact the women were made only in response to defendant's request, where there was no evidence that investigators used the request as an inducement to obtain his confession, where investigators advised defendant that the police had no control over whether the women came to the station, where defendant himself stated that his confession was not thereby induced, and where the request had no relation to relief from the charges he faced. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326, 2000 N.C. LEXIS 350 (2000), cert. denied, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000).

Trial court properly denied defendant's motion to suppress incriminating statements he made to law enforcement, and properly admitted those statements at trial, as none of the tactics that defendant cited that were used by the detectives who questioned him rendered his confession involuntary or made his statements to police subsequently inadmissible. State v. Maniego, 163 N.C. App. 676, 594 S.E.2d 242, 2004 N.C. App. LEXIS 580 (2004).

Defendant's post-Miranda statement was admissible because defendant was a 30-year-old high school graduate with experience in the criminal justice system based upon his numerous prior arrests, defendant was not threatened after being advised of his Miranda rights orally and in writing, defendant waived his Miranda rights orally and in writing, defendant did not ask to speak to an attorney, and the officers advised defendant of the charge, the possible sentence he could receive, the need for him to be truthful and help himself out by cooperating; and told defendant that if he cooperated his cooperation would be related to the district attorney's office and the judge. State v. Houston, 169 N.C. App. 367, 610 S.E.2d 777, 2005 N.C. App. LEXIS 606 (2005).

Defendant's first degree murder conviction was affirmed because the trial court did not err by denying defendant's motion to suppress his written confession as defendant's written waiver of his Miranda rights and his written confession were made understandingly, knowingly, and voluntarily with the assistance of a police officer who acted as defendant's interpreter. State v. Nguyen, 178 N.C. App. 447, 632 S.E.2d 197, 2006 N.C. App. LEXIS 1571, appeal dismissed, cert. denied, 360 N.C. 653, 637 S.E.2d 189 (2006).

**Hearing on Voluntariness.** — When a purported confession of a defendant is offered into evidence and defendant objects, the trial judge, in the absence of the jury, hears evidence of both the State and the defendant upon the question of the voluntariness of defendant's statements. The general rule is that after such inquiry, when there is conflicting evidence offered at the voir dire hearing, the trial judge shall make findings of fact to show the bases of his ruling on the admissibility of the evidence offered. State v. Moore, 275 N.C. 141, 166 S.E.2d 53 (1969).

In-custody statements attributed to a defendant, when offered by the State and objected to by the defendant, are inadmissible for any purpose unless, after a voir dire hearing in the absence of the jury, the court, based upon sufficient evidence, makes factual findings that such statements were voluntarily and understandingly made by the defendant after he had been fully advised as to his constitutional rights. State v. Strickland, 276 N.C. 253, 173 S.E.2d 129 (1970).

When the State offers a confession in a criminal trial and defendant objects, the competency of the confession must be determined by the trial judge in a preliminary inquiry in the absence of the jury. State v. Garnett, 24 N.C. App. 489, 211 S.E.2d 519, appeal dismissed, 287 N.C. 262, 215 S.E.2d 622 (1975).

When a defendant challenges the admissibility of an in-custody confession, the trial judge must conduct a voir dire hearing to determine whether the confession was voluntarily made and whether the requirements of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966) have been met. State v. Biggs, 289 N.C. 522, 223 S.E.2d 371 (1976).

**When Findings Unnecessary.** — When there is no conflict in the evidence on voir dire, it is not error to admit a confession without making specific findings. State v. Biggs, 289 N.C. 522, 223 S.E.2d 371 (1976).

**Effect of Trial Court's Findings.** — Trial judge's findings as to the voluntariness of a confession, and any other facts which determine whether it meets the requirements for admissibility, are conclusive if they are supported by competent evidence in the record. State v. Garnett, 24 N.C. App. 489, 211 S.E.2d 519, appeal dismissed, 287 N.C. 262, 215 S.E.2d 622 (1975); State v. Ferrell, 46 N.C. App. 52, 264 S.E.2d 134 (1980); State v. Leak, 90 N.C. App. 351, 368 S.E.2d 430 (1988).

In determining whether an in-custody statement is voluntarily and understandingly made, the trial court's findings of fact are conclusive on appeal if supported by competent evidence. State v. Travatello, 24 N.C. App. 511, 211 S.E.2d 467 (1975).

**Confession as a Condition of Probation Not Allowed.** — Juvenile who was adjudicated to be a delinquent because of his sexual assault of another child could not be required, as a condition of his probation, to admit to the underlying offense, for purposes of treatment, without being granted use immunity or some other protection from the use of such an admission against him. In re Butts, 157 N.C. App. 609, 582 S.E.2d 279, 2003 N.C. App. LEXIS 928 (2003), review improvidently allowed, appeal dismissed sub nom. In re T.R.B., 358 N.C. 370, 595 S.E.2d 146 (2004).

**Review on Appeal.** — Whether the conduct and language of investigating officers amounted to such threats or promises as to render a subsequent confession involuntary is a question of law reviewable on appeal. State v. Pruitt, 286 N.C. 442, 212 S.E.2d 92 (1975).

Whether conduct on the part of interrogating officers constitutes a threat or induces fear and whether a purported waiver has been knowingly and intelligently given are questions of law reviewable on appeal. State v. Ferrell, 46 N.C. App. 52, 264 S.E.2d 134 (1980).

**If the State offers a part of a confession,** the accused may require the whole confession to be admitted into evidence. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976).

**Court's denial of defendant's motion to**

**suppress in-custody inculpatory statements** he gave to law enforcement officers did not violate his constitutional rights. State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

**Inculpatory Statements of Codefendants.** — Court did not err in allowing into evidence "sanitized" versions of purported statements by codefendants which were inculpatory of each other. State v. Ferrell, 46 N.C. App. 52, 264 S.E.2d 134 (1980).

**Admission of Confessions Upheld.** — When a defendant has been given all the warnings required by the State and federal rules of evidence, and he understands them, and freely and voluntarily waives the right to have right to counsel and freely and voluntarily makes a confession, then the admission of this confession in evidence at a jury trial does not violate defendant's right against self-incrimination. State v. Thompson, 285 N.C. 181, 203 S.E.2d 781, cert. denied, 419 U.S. 867, 95 S. Ct. 123, 42 L. Ed. 2d 104 (1974).

Where the trial court found that defendant was fully apprised of his rights to counsel and to remain silent, that he said he understood them, that he did not appear to be under the influence of drugs, and that he knew what he was doing, the trial court ruled correctly that his subsequent confession was admissible. State v. Travatello, 24 N.C. App. 511, 211 S.E.2d 467 (1975).

Although defendant contended that his lack of sleep and food and his heavy use of drugs and alcohol shortly before his periods of interrogation rendered any in-custody statement involuntary, where after an extensive voir dire hearing the trial court found that defendant was not interrogated on the evening of his arrest because he was drunk, defendant was not under the influence of intoxicating liquors or drugs and was furnished food and coffee when interrogated on the following day, defendant was read his rights before questioning began, and defendant signed a waiver of his rights, the in-custody statement was freely, understandingly and voluntarily made and was therefore properly admitted into evidence. State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975), death sentence vacated, 429 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

In a prosecution for armed robbery, the testimony of a witness employed as a dispatcher by the police department relating defendant's in-custody confession of guilt was admissible notwithstanding the dispatcher's failure to advise defendant of his constitutional rights, where the dispatcher questioned defendant while visiting a relative who shared defendant's cell, was not in any way acting as a police officer, and was not, in fact, a police officer. State v. Johnson, 29 N.C. App. 141, 223 S.E.2d 400, cert. denied, 290 N.C. 310, 225 S.E.2d 831 (1976).

In a prosecution for driving under the influence, the trial court did not err in admitting defendant's confession made to a police officer where the court found that defendant was properly advised of his rights; he knowingly waived his rights; he pointed to or told the officer of the wreck and described the location where he had the wreck; and his answers to the questions were free, voluntary, and not coerced by the officer; and the fact that defendant was intoxicated at the time of his confession did not require its exclusion. State v. Spencer, 46 N.C. App. 507, 265 S.E.2d 451 (1980).

Confession made by 14 year old defendant in murder case held voluntary. State v. Bunnell, 340 N.C. 74, 455 S.E.2d 426 (1995).

The trial court's findings of fact, not specifically excepted to by the defendant, fully supported its conclusions of law that defendant's statements to the police were freely, voluntarily and understandingly made and that none of the defendant's State constitutional rights were violated by his arrest, detention, interrogation or statements. State v. Cheek, 351 N.C. 48, 520 S.E.2d 545, 1999 N.C. App. LEXIS 1158 (1999), cert. denied, 530 U.S. 1245, 120 S. Ct. 2694, 147 L. Ed. 2d 965 (2000).

## VI. WITNESS FEES, COSTS, ETC.

**Appointment Fee Under G.S. 7A-455.1.** — Plain language of N.C. Const., Art. I, § 23, prohibiting the assessment of costs against acquitted defendants, encompasses the appointment fee provided for by G.S. 7A-455.1(a); by requiring payment of the appointment fee by acquitted defendants, the general assembly devised a statutory framework that does not comport with the constitutional limitation prohibiting a criminal defendant from paying costs unless found guilty, and as such it may not stand. Accordingly, the appointment fee set out in § 7A-455.1 is a cost of prosecution and may not be imposed upon a defendant in a criminal matter until that defendant has been convicted or pled guilty or nolo contendere. State v. Webb, 358 N.C. 92, 591 S.E.2d 505, 2004 N.C. LEXIS 5 (2004).

G.S. 7A-455.1(b), which required payment of the appointment fee regardless of the outcome of the proceedings was severed in order to allow the State to assess the appointment fee against convicted defendants as constitutionally allowed under N.C. Const., Art. I, § 23; G.S. 7A-455.1(a), requiring payment at the time of the appointment was also severed, as it was inconsistent with the ruling that the appointment fee was a cost, and as pursuant to G.S. 7A-304(a), costs, including the pretrial release services fee under G.S. 7A-304(a)(5) and and the North Carolina State Bureau of Investigation laboratory fee under G.S. 7A-304(a)(7), were assessed only after a defendant was convicted or entered a plea of guilty or nolo contendere. State v. Webb, 358 N.C. 92, 591 S.E.2d 505, 2004 N.C. LEXIS 5 (2004).

G.S. 7A-455.1 is unconstitutional because the portion of the appointment fee under G.S. 7A-455.1(a) that is paid to the North Carolina Indigent Persons' Attorney Fee Fund does not fall within the definition of "fees" since it is not directly related to the individual defendant who is resisting prosecution or defending against a particular criminal charge, but helps support that part of the criminal justice system that enables the State constitutionally to prosecute indigent defendants who qualify for court-appointed counsel; N.C. Const., Art. I, § 23 does not insulate acquitted defendants from bearing the burden of paying for their own counsel, but it does shield an acquitted defendant from having to pay for a system designed to reimburse the State for expenses necessarily incurred in the conduct of the prosecution. State v. Webb, 358 N.C. 92, 591 S.E.2d 505, 2004 N.C. LEXIS 5 (2004).

Inclusion of virtually identical language to former N.C. Const., Art. I, § 11 in N.C. Const., Art. I, § 23 convincingly demonstrates North Carolina's continuing dedication to the principle that acquitted defendants should not be required to pay the costs of their prosecution; thus, requiring acquitted defendants to pay the appointment fee under G.S. 7A-455.1, which was a cost of prosecution, would defeat the intent and purpose of either Constitution's provision. State v. Webb, 358 N.C. 92, 591 S.E.2d 505, 2004 N.C. LEXIS 5 (2004).

**Payment of Witness Fees.** — This provision, exempting an acquitted defendant from payment of necessary witness fees of the defense, does not require that they shall be paid by the public; the section operates only to deprive the witnesses of their common-law right to look to defendant for payment. State v. Hicks, 124 N.C. 829, 32 S.E. 957 (1899).

**Assistance of a Pathologist.** — Even though defendant's identity as the perpetrator of the crime charged was critical, and the state's case was built on circumstantial evidence, defendant failed to satisfy his burden of showing either that the assistance of a pathologist would have materially aided him in the preparation of his defense or that the lack thereof deprived him of a fair trial. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994), cert. denied, 514 U.S. 1091, 115 S. Ct. 1815, 131 L. Ed. 2d 738 (1995).

## Sec. 24. Right of jury trial in criminal cases.

No person shall be convicted of any crime but by the unanimous verdict of a jury in open court. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo.

**Cross References.** — As to jurors, generally, see G.S. 9-1 et seq. As to the rights of defendants in criminal cases to grand juries and trial juries from which persons have not been arbitrarily excluded on discriminatory grounds, see also N.C. Const., Art. I, § 19 and the notes thereunder. For provision prohibiting exclusion from jury service on discriminatory grounds, see N.C. Const., Art. I, § 26.

**History.** — The provisions of this section are similar to those of Art. I, § 13, Const. 1868, as amended in 1946.

**Legal Periodicals.** — For case law survey as to indictment and trial by jury, see 45 N.C.L. Rev. 878 (1967).

For note on jurisdiction of courts-martial to try servicemen for civilian offenses, see 48 N.C.L. Rev. 380 (1970).

For note on juries in the juvenile justice system, see 48 N.C.L. Rev. 666 (1970).

For note on right to jury trial in criminal contempt proceedings, see 6 Wake Forest Intra. L. Rev. 356 (1970).

For comment on capital sentencing statute, see 16 Wake Forest L. Rev. 765 (1980).

For survey of 1982 law on criminal procedure, see 61 N.C.L. Rev. 1090 (1983).

For article, "State v. McCarver: The Role of Jury Unanimity in Capital Sentencing," see 74 N.C.L. Rev. 2061 (1996).

For article, "The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts," see 38 Wake Forest L. Rev. 1111 (2003).

For note "The Constitutional Right to a Jury Under Blakely v. Washington: Can North Carolina Defendants Waive Their State Right?," see 83 N.C. L. Rev. 1548 (2005).

### CASE NOTES

I. In General.
II. Unanimous Verdict of Twelve.
III. Selection of Jurors.
IV. Petty Misdemeanors.

## I. IN GENERAL.

***Editor's Note.*** — *Some of the cases cited below were decided under former Art. I, § 13, Const. 1868, before and after its amendment in 1946.*

**The defendant has an absolute constitutional right to plead not guilty and be tried by a jury.** He should not and could not be punished for exercising that right. State v. Langford, 319 N.C. 340, 354 S.E.2d 523 (1987).

**Common-Law Principle.** — It is a fundamental principle of the common law, declared in Magna Charta and incorporated in this section, that no person shall be convicted of any crime but by the unanimous verdict of a jury in open court. State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

**The essential attributes of trial by jury,** as guaranteed by this section, are the number of jurors, their impartiality and a unanimous verdict. State v. Dalton, 206 N.C. 507, 174 S.E. 422 (1934).

**Trial as to Each Essential Element.** — Defendant is entitled as of right to a jury trial as to every essential element of the crime charged, including the question as to his identity. State v. Lewis, 274 N.C. 438, 164 S.E.2d 177 (1968); State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

It is fundamental that one charged with a crime in this state is entitled, as a matter of right, under both the federal and State Constitutions, to a jury trial as to every essential element of the crime charged. However, the punishment imposed is generally not an element of the crime. State v. Field, 75 N.C. App. 647, 331 S.E.2d 221, cert. denied and appeal dismissed, 315 N.C. 186, 337 S.E.2d 582 (1985).

**The right to be tried by one's peers of the vicinage is subject to the ability to secure a fair trial;** both defendant and the State are entitled to a fair trial, and a fair trial requires an impartial jury; where it appeared necessary to judge to remove the case to some neighboring county in order to secure a fair trial, such removal to a neighboring county did not violate the constitutional prohibition. State v. Chandler, 324 N.C. 172, 376 S.E.2d 728 (1989).

**"Open Court" Not Applicable to Civil Proceedings.** — This section is directed to an "open court" proceeding during a criminal conviction only, and it is not applicable to civil proceedings. WSOC Television, Inc. v. State ex rel. Att'y Gen., 107 N.C. App. 448, 420 S.E.2d 682, cert. denied, 333 N.C. 168, 424 S.E.2d 905 (1992).

**Jury Trial May Not Be Waived After Plea of Not Guilty.** — A defendant in a criminal prosecution for a felony or a misdemeanor may not waive his constitutional right to trial by jury in the superior court after entering a plea of "not guilty" without changing his plea, nor may the General Assembly permit him to do so by statute; and where the court, after a plea of "not guilty," finds the defendant guilty without a jury trial, the judgment will be stricken out and the cause remanded. State v. Hill, 209 N.C. 53, 182 S.E. 716 (1935). See also, State v. Muse, 219 N.C. 226, 13 S.E.2d 229 (1941).

A jury trial cannot be waived in a criminal action; hence, where the facts were agreed upon by the State and the accused and submitted to the judge for his decision, it was held that such a procedure was not warranted by the law. State v. Holt, 90 N.C. 749 (1884).

Where a defendant enters a plea of "not guilty" in the superior court, he may not thereafter, without being permitted to change his plea, waive his constitutional right of trial by jury. State v. Rogers, 162 N.C. 656, 78 S.E. 293, 46 L.R.A. (n.s.) 38, 1914A Ann. Cas. 867 (1913). See also, State v. Hartsfield, 188 N.C. 357, 124 S.E. 629 (1924).

Upon defendant's appeal from judgment and sentence by the court after defendant had entered a conditional plea of guilty, the case would be remanded in order that a jury may pass upon defendant's guilt or innocence in accordance with defendant's constitutional right. State v. Ellis, 210 N.C. 170, 185 S.E. 662 (1936).

In the superior court, on indictment originating therein, trials by jury in a criminal action cannot be waived by the accused. State v. Lewis, 274 N.C. 438, 164 S.E.2d 177 (1968).

It is rudimentary that a trial by jury in a criminal action cannot be waived by the accused in the superior court as long as his plea remains "not guilty." State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

When a defendant pleads not guilty in cases where a trial by jury is guaranteed by the organic law, he must be tried by a jury of twelve, and he cannot waive jury trial. State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

The right to a jury trial is not only guaranteed by the Sixth Amendment to the United States Constitution, but under the North Carolina Constitution the right also can not be waived by a defendant who pleads not guilty. State v. Thompson, 118 N.C. App. 33, 454 S.E.2d 271 (1995).

**Thoughtful and full deliberation in an effort to achieve unanimity** has only a salutary effect on our judicial system: It tends to prevent arbitrary and capricious sentence recommendations. State v. McCarver, 341 N.C. 364, 462 S.E.2d 25 (1995), cert denied, 517 U.S. 1110, 116 S. Ct. 1332, 134 L. Ed. 2d 482 (1996).

**And this applies to misdemeanors as well** as to the more serious offenses. State v.

Pulliam, 184 N.C. 681, 114 S.E. 394 (1922).

**But Plea of Guilty Renders Jury Unnecessary.** — A defendant may plead guilty, or nolo contendere, or autrefois convict, and the impaneling of a jury is unnecessary. State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

**Conviction by Jury Necessary to Punishment.** — It is fundamental that a defendant charged with crime, other than a petty misdemeanor, who pleads not guilty, may be punished only after conviction by a jury. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

**A criminal defendant may not be punished at sentencing for exercising his constitutional right** to trial by jury. State v. Cannon, 326 N.C. 37, 387 S.E.2d 450 (1990).

Where it can reasonably be inferred from the language of the trial judge that the sentence was imposed at least in part because defendant did not agree to a plea offer by the State and insisted on a trial by jury, defendant's constitutional right to trial by jury has been abridged, and a new sentencing hearing must result. State v. Cannon, 326 N.C. 37, 387 S.E.2d 450 (1990).

**A trial by a jury which is improperly constituted is so fundamentally flawed that the verdict cannot stand;** thus, defendant was entitled to a new sentencing hearing where an alternate juror was substituted for a juror who was dismissed after participating in half a day of deliberations. State v. Bunning, 346 N.C. 253, 485 S.E.2d 290 (1997).

The post-verdict removal of a juror for juror misconduct committed during the guilt-innocence phase deliberations on the grounds that he informed other jurors that the word on the street was that the defendant's family might get the jurors violated the defendant's right under this section to trial by a jury composed of 12 qualified jurors and rendered the trial so fundamentally flawed that the verdict could not stand. State v. Poindexter, 353 N.C. 440, 545 S.E.2d 414, 2001 N.C. LEXIS 428 (2001).

**A party moving for a new trial grounded upon misrepresentation by a juror during voir dire must show:** (1) the juror concealed material information during voir dire; (2) the moving party exercised due diligence during voir dire to uncover the information; (3) and the juror demonstrated actual bias or bias implied as a matter of law that prejudiced the moving party. State v. Buckom, 126 N.C. App. 368, 485 S.E.2d 319 (1997), cert. denied, 522 U.S. 973, 118 S. Ct. 425, 139 L. Ed. 2d 326 (1998).

**Juror Misrepresentation Did Not Deny Defendant Right to Trial by Impartial Jury.** — Defendant was not denied his rights to confrontation, to effective assistance of counsel, to due process, to a jury trial, and to be free from cruel and unusual punishment when the trial court denied defendant's motion for a mistrial based on the alleged misconduct of a juror; the juror inadvertent failure to disclose the 40-year-old information she had forgotten did not amount to concealment, and the juror demonstrated no bias. State v. Maske, 358 N.C. 40, 591 S.E.2d 521, 2004 N.C. LEXIS 18 (2004).

**Denial of a party's right to exercise intelligent peremptory strikes, based solely upon juror misrepresentation during voir dire,** is not guaranteed by Art. I, § 19 and 24 of the North Carolina Constitution. State v. Buckom, 126 N.C. App. 368, 485 S.E.2d 319 (1997), cert. denied, 522 U.S. 973, 118 S. Ct. 425, 139 L. Ed. 2d 326 (1998).

**Defendant's Sentence Need Not Be Based on Unanimous Recommendation.** — Neither Art. I, § 24, nor any other provision of the North Carolina Constitution requires that a defendant's sentence be based upon a unanimous recommendation of a jury. State v. Baldwin, 330 N.C. 446, 412 S.E.2d 31 (1992).

**Premature Selection of Foreperson Not a Constitutional Violation.** — Court found no violation of G.S. 15A-1215(a) or the defendant's constitutional rights under this section when 12 jurors prematurely selected a foreperson while alternates were still present in jury room, because they made no deliberations nor had any other conversation regarding the facts of the case. State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

**Special Verdict in Trial for Nonsupport.** — In a prosecution under G.S. 49-2, a verdict upon the issues of paternity and nonsupport, if resolved in favor of the State, is sufficient to support a judgment against defendant without a general verdict by the jury of guilty. This does not contravene the provisions of this section and N.C. Const., Art. I, § 23 requiring trial and verdict by jury in criminal cases. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

**Jury Instructions.** — Defendant was not deprived of his constitutional rights, because no conflict existed between "Issues and Recommendation as to Punishment" form and oral instructions given by the trial court. State v. Peterson, 350 N.C. 518, 516 S.E.2d 131, 1999 N.C. App. LEXIS 419 (1999), cert. denied, 528 U.S. 1164, 120 S. Ct. 1181, 145 L. Ed. 2d 1087 (2000).

Trial court's curative instruction to the jury following the prosecutor's comment at trial was sufficient, even though not made immediately after the prosecutor's comments, as the the trial court stated that the comment was improper, and the statement was followed by an instruction to the jury not to consider the failure of the accused to offer the accused as a witness. State v. Kemmerlin, 356 N.C. 446, 573 S.E.2d 870, 2002 N.C. LEXIS 1260 (2002).

**Jury Request to Review Testimony.** — Both this section and G.S. 15A-1233 require the trial court to summon all jurors into the courtroom before hearing and addressing a jury request to review testimony, and to exercise its discretion in denying or granting the request. Failure of the trial court to comply with these mandates entitles defendant to press these points on appeal, notwithstanding his failure to object at trial. State v. Ashe, 314 N.C. 28, 331 S.E.2d 652 (1985).

The trial judge's response to the jury's request to review certain testimony by sending a message to the jury through the bailiff, rather than by addressing the jury as a whole in open court, though erroneous, was not prejudicial to defendant. State v. McLaughlin, 320 N.C. 564, 359 S.E.2d 768 (1987).

**Special Instruction to Jury Foreperson Violated Constitution.** — Defendant's rights under N.C. Const., Art. I, § 24 were violated as a jury foreperson received more than one instruction that the remaining jurors did not receive after the foreperson was ejected by the remaining jurors due to concerns about the foreperson's impartiality; defendant was entitled to a consistently-instructed jury under the constitution. State v. Wilson, — N.C. App. —, 665 S.E.2d 751, 2008 N.C. App. LEXIS 1615 (2008).

**Judge's Communication with Jury Via Written Notes.** — Judge's communication with jury in the jury room via written notes violated the requirements of G.S. 15A-1233(a); however, where the judge communicated with all jurors, his notes having been delivered to the jury as a whole, there was no violation of the North Carolina Constitution, and defendant failed to show other prejudice. State v. Colvin, 92 N.C. App. 152, 374 S.E.2d 126 (1988), cert. denied, 324 N.C. 249, 377 S.E.2d 758 (1989).

**Conversation Between Court and Juror.** — Where the record established that the substance of a conversation between a juror and the court related to the juror's having "overheard something about the case," where the court excused the juror, and to insure that "no one should be suspicious" about his ability to be fair and impartial, this juror was removed from the case prior to deliberations, and where no other juror indicated that he or she had overheard anything about the case, the conversation between the court and the juror could not have influenced the verdict. State v. Harrington, 335 N.C. 105, 436 S.E.2d 235 (1993).

**Conversation Between Judge and Foreperson Unrecorded.** — Defendant's claim that the trial court had unrecorded bench conversations with a jury foreperson in violation of N.C. Const., Art. I, § 24 was preserved for review, even without an objection at trial under N.C. R. App. P. 10(b)(1). State v. Wilson, — N.C. App. —, 665 S.E.2d 751, 2008 N.C. App. LEXIS 1615 (2008).

**Inquiry Into Alleged Communication Between Prosecution and Juror Was Not Required.** — Trial court did not err by refusing to inquire further into an alleged communication between the prosecution and a juror where there was no indication that the alleged inappropriate communication had any influence on the juror or the verdict of the entire jury; there was no evidence that the juror heard what the assistant district attorney discussed with the clerk in the courtroom, in the presence of the court. State v. Jacobs, 172 N.C. App. 220, 616 S.E.2d 306, 2005 N.C. App. LEXIS 1586 (2005).

**Inquiry by Trial Judge as to Jury's Numerical Split.** — In the absence of a federal or state constitutional basis requiring the adoption of a per se rule, the court will look to the "totality of the circumstances" in evaluating a trial judge's inquiry as to a jury's numerical split. State v. Yarborough, 64 N.C. App. 500, 307 S.E.2d 794 (1983).

The context of inquiry as to the jury's numerical split may show that the inquiry is coercive, but such an inquiry is not inherently coercive or violative of this section's guarantee of the right to a trial by jury. State v. Yarborough, 64 N.C. App. 500, 307 S.E.2d 794 (1983).

An inquiry into a jury's numerical division is often useful in timing recesses, in determining whether there has been any progress toward verdict, and in deciding whether to declare a mistrial because of a dead-locked jury. State v. Yarborough, 64 N.C. App. 500, 307 S.E.2d 794 (1983); State v. Fowler, 312 N.C. 304, 322 S.E.2d 389 (1984).

Inquiries into the division of the jury are not a per se violation of this section when the trial court makes it clear that it does not desire to know whether the majority is for conviction or acquittal. Such inquiries are not inherently coercive, and without more do not violate the right to trial by jury guaranteed by the North Carolina Constitution. The appropriate standard is whether in the totality of the circumstances the inquiry is coercive. State v. Fowler, 312 N.C. 304, 322 S.E.2d 389 (1984).

Trial judge's questions about the numerical division of a jury do not constitute a per se violation of this section. Rather, the proper analysis is whether, in considering the totality of the circumstances, the inquiry was coercive. State v. Bussey, 321 N.C. 92, 361 S.E.2d 564 (1987).

Trial judge did not violate defendant's right to trial by jury by asking the jury about its numerical division on the issue of guilt when the jury could not reach a verdict on charges of conspiracy to traffic in cocaine by transportation, trafficking in cocaine by transportation, and maintaining a vehicle which was used for unlawfully keeping or selling controlled substances, or abuse its discretion by giving the jury an instruction on further deliberations, pursuant to G.S. 15A-1235. State v. Batchelor, 157 N.C. App. 421, 579 S.E.2d 422, 2003 N.C. App. LEXIS 739 (2003).

**The disjunctive phrasing of the jury instruction was not a fatal ambiguity** which resulted in a nonunanimous jury verdict. State v. Oliver, 343 N.C. 202, 470 S.E.2d 16 (1996).

**Polling of Jurors Was Proper.** — Where each of the jurors individually was told the charges for which the jury had returned a guilty verdict and was asked whether this was their verdict and whether they still assented to the verdict there was no error in the manner in which the jury was polled. State v. Ramseur, 338 N.C. 502, 450 S.E.2d 467 (1994).

**Trial court's failure to inquire why jurors requested to be referred to by individual juror number the day after they returned guilty verdicts and were polled by name did not indicate that defendant was denied a fair trial;** defendant's speculation that the jurors were influenced by the seizure suffered by defendant's mother after the verdict was returned or by defendant's attack of a law enforcement officer after the jury was removed from the court room was not enough to show exposure to external influence not was it a de facto indicator of prejudice. State v. Garcell, 363 N.C. 10, 678 S.E.2d 618, 2009 N.C. LEXIS 239 (2009).

**Judge's Warning to Restrict Public Egress Was Proper.** — Where trial judge informed those in the courtroom that he was concerned that the jury would be distracted by the movement of spectators in and out of the room and where he consequently warned them that if they wished to leave the courtroom, they should do so immediately, for they would not be allowed to do so after closing arguments began, barring an emergency, the order was not a denial of a public trial in violation of this section since judge did not vacate the courtroom nor bar the courtroom door without due warning to those within and without, and since the judge was authorized under G.S. 15A-1034(a) to impose reasonable limitations on access to the courtroom. State v. Clark, 324 N.C. 146, 377 S.E.2d 54 (1989).

**Clearing Courtroom During Testimony of Child Rape Victim.** — In a prosecution for first-degree rape of a child, the constitutional right of defendant to a public trial was not violated by the court's order that, during the testimony of the seven-year-old victim, the courtroom be cleared of all persons except defendant, defendant's family, defense counsel, defense witnesses, the prosecutor, the State's witnesses, officers of the court, members of the jury, and members of the victim's family. State v. Burney, 302 N.C. 529, 276 S.E.2d 693 (1981).

**Juvenile Proceedings.** — Constitutional guaranty of trial by jury has no application to a proceeding under the Juvenile Court Act. In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969), aff'd sub nom. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1970).

Absent a statute providing for a jury trial, it is almost universally held that in juvenile court delinquency proceedings the alleged delinquent has no right under the pertinent State or federal Constitutions to demand that the issue of his delinquency be determined by a jury. In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969), aff'd sub nom. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1970).

**The bifurcated procedure that the legislature has established for impaired driving cases,** with the jury determining whether G.S. 20-138.1 has been violated and the judge determining the length of punishment required under G.S. 20-179, is constitutional. State v. Field, 75 N.C. App. 647, 331 S.E.2d 221, cert. denied and appeal dismissed, 315 N.C. 186, 337 S.E.2d 582 (1985).

Because the factors before the trial judge in determining sentencing are not elements of the offense, their consideration for purposes of sentencing is a function of the judge and is not susceptible to constitutional challenge based upon either the right to a jury trial under U.S. Const., Amend. VI or this section. State v. Denning, 316 N.C. 523, 342 S.E.2d 855 (1986), involving sentencing under § 20-179 for impaired driving.

**Increase in Punishment Based on Aggravating Factor.** — Trial judge's increasing of defendant's punishment under the Safe Roads Act of 1983 after a finding of a grossly aggravating factor, namely, that defendant had a prior conviction for a similar offense within seven years, did not in any way deprive defendant of his right to jury trial. State v. Denning, 76 N.C. App. 156, 332 S.E.2d 203 (1985), modified and aff'd, 316 N.C. 523, 342 S.E.2d 855 (1986).

**Driver's License Revocation.** — Since an action to revoke a driver's license is a civil action, jury trial is not necessary. State v. Carlisle, 20 N.C. App. 358, 201 S.E.2d 704 (1973), aff'd, 285 N.C. 229, 204 S.E.2d 15 (1974).

**Disbarment Proceedings.** — In disbarment proceedings, respondent's exception on the ground that the proceedings deprived him of his right to trial by jury was untenable when the matters in issue were determined by a jury upon his appeal to the superior court. In re West, 212 N.C. 189, 193 S.E. 134 (1937).

**The North Carolina Workers' Compensation Act** was held not to be unconstitutional as impairing the right of trial by jury guaranteed by this section. Hanks v. Southern Pub. Util. Co., 204 N.C. 155, 167 S.E. 560 (1933).

**Subsection (c) of § 15A-928 does not violate the right to jury trial** embodied in this section. State v. Smith, 291 N.C. 438, 230 S.E.2d 644 (1976).

**Determination of Appropriate Sentence.** — North Carolina courts have long adhered to the principle forbidding a trial court from improperly considering the defendant's exercise of her rights under this provision of the Constitution as an influential factor in determining the appropriate sentence. State v. Pavone, 104 N.C. App. 442, 410 S.E.2d 1 (1991).

Defendant's right to a jury trial was violated where a sentence was enhanced based on the fact that he committed a crime while on probation; probationary status should have been a factor determined by a jury. State v. Shine, 173 N.C. App. 699, 619 S.E.2d 895, 2005 N.C. App. LEXIS 2306 (2005).

Trial court's finding of an aggravating factor under G.S. 15A-1340.16(d)(12) at defendant's trial was harmless beyond a reasonable doubt, and did not violate N.C. Const., Art. I, § 24. State v. Blackwell, 361 N.C. 41, 638 S.E.2d 452, 2006 N.C. LEXIS 1301 (2006).

Imposition of an aggravated sentence on defendant's conviction for assault with a deadly weapon with intent to kill inflicting serious injury did not violate defendant's right to a jury trial because while G.S. 15A-1340.16 did not apply based on when the crime occurred, a common-law procedural mechanism existed for submitted aggravating factors to the jury in the form of a special verdict; overwhelming evidence was presented that defendant shot a rival gang member in the rival gang member's territory, supporting the aggravating factor that defendant committed the crime to further or benefit the purposes of a criminal street gang. State v. Roberson, 182 N.C. App. 133, 641 S.E.2d 347, 2007 N.C. App. LEXIS 491 (2007).

**Trial court did not deprive the defendant of a fair trial by denying the defendant's pre-trial motion to continue** the trial to a date more than 20 days after the defendant was charged in a true bill of indictment with habitual felon status; the assistant district attorney handling the case, notified the court that the State was not going to proceed with the habitual felon charge until a later date, if at all, and after the jury verdict was announced, the State dismissed the defendant's habitual felon indictment so that defendant was sentenced solely on the substantive charges against the defendant. State v. Adams, 156 N.C. App. 318, 576 S.E.2d 377, 2003 N.C. App. LEXIS 102 (2003), cert. denied, 357 N.C. 166, 580 S.E.2d 698 (2003).

**Multiple Short-Form Indictments Did Not Create a Danger of Ununanimous Verdicts.** — Appellate court erred in reversubg defendant's convictions of first-degree statutory rape, G.S. 14-27.2, and taking indecent liberties with a minor, G.S. 14-202.1(a)(1), as defendant was properly charged by short-form indictments on all the charges as authorized by G.S. 15-144.2(a), because there was no danger of a nonunanimous verdict resulting from the multiple indictments in violation of N.C. Const., Art. 1, § 24, and G.S. 15A-1237(b), as even if some jurors disagreed on the kinds of sexual misconduct committed, the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of any immoral, improper, or indecent liberties as required by G.S. 14-202.1(a)(1), and because defendant was indicted on five counts of statutory rape, the victim testified to five specific incidents of statutory rape, and five verdicts of guilty were returned. State v. Lawrence, 360 N.C. 368, 627 S.E.2d 609, 2006 N.C. LEXIS 30 (2006).

**State's Recidivist Statutes Survive Double Jeopardy Challenges.** — Recidivist statutes, or repeat-offender statutes, survived double jeopardy challenges because they increased the severity of the punishment for the crime being prosecuted, and they did not punish a previous crime a second time; the Apprendi and Blakely holdings did not extend to the habitual misdemeanor assault statute, G.S. 14-33.2. State v. Massey, — N.C. App. —, 635 S.E.2d 528, 2006 N.C. App. LEXIS 2141 (2006).

**Blakely Error Harmless.** — Trial court's Blakely error in finding that defendant committed the present offense while on pretrial release on another charge without submitting the question to a jury was harmless pursuant to G.S. 15A-1443(b) because defendant never disputed that he was on pretrial release when he committed the crimes, and the validity of the charges for which he was on pretrial release was irrelevant. State v. Watts, 185 N.C. App. 539, 648 S.E.2d 862, 2007 N.C. App. LEXIS 1808 (2007), cert. denied, Watts v. North Carolina, — U.S. —, 128 S. Ct. 1719, L.E.2d 525 (2008).

**Applied** in State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974); State v. Parker, 29 N.C. App. 413, 224 S.E.2d 280 (1976); State v. Boone, 293 N.C. 702, 239 S.E.2d 459 (1977); State v. Coats, 301 N.C. 216, 270 S.E.2d 422 (1980); State v. Deyton, 59 N.C. App. 326, 296 S.E.2d 497 (1982); State v. McEntire, 71 N.C. App. 720, 323 S.E.2d 439 (1984); State v. Britt, 93 N.C. App. 126, 377 S.E.2d 79 (1989); State v. Patterson, 332 N.C. 409, 420 S.E.2d 98 (1992); State v. Honaker, 111 N.C. App. 216, 431 S.E.2d 869 (1993); State v. Funchess, 141 N.C. App. 302, 540 S.E.2d 435, 2000 N.C. App. LEXIS 1398 (2000); State v. Reaves, 142 N.C. App. 629, 544 S.E.2d 253, 2001 N.C. App. LEXIS 170 (2001); State v. Morgan, 359 N.C. 131, 604 S.E.2d 886, 2004 N.C. LEXIS 1199 (2004); State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004); State v. Dean, — N.C. App. —, 674 S.E.2d 453, 2009 N.C. App. LEXIS 456 (2009).

**Cited** in Lofton v. Lofton, 26 N.C. App. 203, 215 S.E.2d 861 (1975); State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981); State v. Hall, 305 N.C. 77, 286 S.E.2d 552 (1982); State v. Davis, 305 N.C. 400, 290 S.E.2d 574 (1982); State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985); State v. Gilliam, 317 N.C. 293, 344 S.E.2d 783 (1986); State v. Belton, 318 N.C. 141, 347 S.E.2d 755 (1986); State v. Davis, 86 N.C. App. 25, 356 S.E.2d 607 (1987); State v. Kennedy, 320 N.C. 20, 357 S.E.2d 359 (1987); State v. Mitchell, 321 N.C. 650, 365 S.E.2d 554 (1988); State v. Godwin, 95 N.C. App. 565, 383 S.E.2d 234 (1989); State v. Hope, 96 N.C. App. 498, 386 S.E.2d 224 (1989); Ragan v. County of Alamance, 98 N.C. App. 636, 391 S.E.2d 825 (1990); State v. Thomas, 329 N.C. 423, 407 S.E.2d 141 (1991); In re Alamance County Ct. Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991); State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991); State v. Lyons, 330 N.C. 298, 412 S.E.2d 308 (1991); State v. Ainsworth, 109 N.C. App. 136, 426 S.E.2d 410 (1993); State v. Harris, 333 N.C. 544, 428 S.E.2d 823 (1993); State v. Nelson, 341 N.C. 695, 462 S.E.2d 225 (1995); State v. Thomas, 344 N.C. 639, 477 S.E.2d 450 (1996); State v. Bond, 345 N.C. 1, 478 S.E.2d 163 (1996); State v. Larry, 345 N.C. 497, 481 S.E.2d 907 (1997); State v. Cummings, 346 N.C. 291, 488 S.E.2d 550 (1997); Green v. French, 143 F.3d 865 (4th Cir. 1998); State v. McNeil, 350 N.C. 657, 518 S.E.2d 486, 1999 N.C. LEXIS 880 (1999); State v. Cheek, 351 N.C. 48, 520 S.E.2d 545, 1999 N.C. App. LEXIS 1158 (1999); State v. Galloway, 145 N.C. App. 555, 551 S.E.2d 525, 2001 N.C. App. LEXIS 744 (2001); State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001); In re Allison, 143 N.C. App. 586, 547 S.E.2d 169, 2001 N.C. App. LEXIS 329 (2001); State v. Brothers, 151 N.C. App. 71, 564 S.E.2d 603, 2002 N.C. App. LEXIS 653 (2002); State v. Price, — N.C. App. —, 611 S.E.2d 891 (2005); State v. Norris, 360 N.C. 507, 630 S.E.2d 915, 2006 N.C. LEXIS 592 (2006); State v. Burgess, 181 N.C. App. 27, 639 S.E.2d 68, 2007 N.C. App. LEXIS 72 (2007); State v. Replogle, 181 N.C. App. 579, 640 S.E.2d 757, 2007 N.C. App. LEXIS 257 (2007); State v. Hurt, 361 N.C. 325, 643 S.E.2d 915, 2007 N.C. LEXIS 407 (2007); State v. Davis, 191 N.C. App. 535, 664 S.E.2d 21, 2008 N.C. App. LEXIS 1508 (2008); State v. Jacobs, — N.C. App. —, 668 S.E.2d 346, 2008 N.C. App. LEXIS 2006 (2008); State v. Rouse, — N.C. App. —, 679 S.E.2d 520, 2009 N.C. App. LEXIS 1162 (July 21, 2009).

## II. UNANIMOUS VERDICT OF TWELVE.

**Jury Must Have 12 Persons.** — It is elementary that the jury provided by law for the trial of indictments is composed of 12 persons; a less number is not a jury. State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

**And No More.** — If a defendant in a felony trial cannot consent to a trial by fewer than 12 jurors, it is clear that he cannot assent to deliberations by more than 12. State v. Rowe, 30 N.C. App. 115, 226 S.E.2d 231 (1976).

**A verdict by 11 jurors is a nullity,** despite defendant's failure to assign his conviction by 11 jurors as error. State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

**Unanimous Verdict of 12 Required.** — A verdict of guilty rendered by a number of jurors less than 12 is unconstitutional. State v. Berry, 190 N.C. 363, 130 S.E. 12 (1925).

No person may be finally convicted of any crime except by the unanimous consent of 12 jurors who have been duly impaneled to try his case. State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

It has never been doubted that the Constitution of this State requires a unanimous verdict for a valid conviction for any crime. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

To convict a defendant, the jurors must unanimously agree that the State has proven beyond a reasonable doubt each and every essential element of the crime charged. State v. Jordan, 305 N.C. 274, 287 S.E.2d 827 (1982); State v. McDougall, 308 N.C. 1, 301 S.E.2d 308, cert. denied, 464 U.S. 865, 104 S. Ct. 197, 78 L. Ed. 2d 173 (1983); 501 U.S. 1223, 111 S. Ct. 2840, 115 L. Ed. 2d 1009 (1991).

**Verdict Unaffected by Subsequent Change of Mind.** — If the jury is unanimous at the time the verdict is returned, the fact that some of them change their minds at any time thereafter is of no consequence; the verdict rendered remains valid and must be upheld. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

**Risk of Nonunanimous Verdict.** — The risk of a nonunanimous verdict arises if the trial court instructs the jury that it may find the defendant guilty of the crime charged on either of two alternative grounds and each alternative ground constitutes a separate and distinct offense. State v. Petty, 132 N.C. App. 453, 512 S.E.2d 428 (1999).

There is no risk of a nonunanimous verdict where the statute under which the defendant is charged criminalizes a single wrong that may be proved by evidence of the commission of any one of a number of acts, and the court instructs the jury disjunctively as to various alternative acts that will establish an element of the offense, because in such a case the particular act performed is immaterial. State v. Petty, 132

N.C. App. 453, 512 S.E.2d 428 (1999).

**Determination of Ambiguity As to Verdict Unanimity.** — If a statute criminalizes two or more discrete and separate wrongs, and a jury instruction permitting conviction on either of two alternative grounds possibly could result in a nonunanimous verdict, the court must examine the verdict, the charge, the jury instructions, and the evidence to determine whether any ambiguity as to unanimity has been removed. State v. Petty, 132 N.C. App. 453, 512 S.E.2d 428 (1999).

When defendant was charged with 10 counts of statutory rape, the trial court submitted all 10 counts to the jury without differentiating among them, the indictment alleged 10 counts occurring between two dates, without specifying a date for any one charge, and the verdict sheets indicated guilty verdicts without specifying a particular offense, defendant's constitutional right to a unanimous jury verdict was violated because it could not be said that the jury unanimously agreed that defendant committed any particular offense. State v. Holden, 160 N.C. App. 503, 586 S.E.2d 513, 2003 N.C. App. LEXIS 1818 (2003), aff'd, 359 N.C. 60, 602 S.E.2d 360 (2004).

Because of the trial court's failure to ensure that each juror had in mind the same instances of abuse when voting to convict defendant of multiple counts of first-degree sexual offense and indecent liberties with a minor, defendant's right to a unanimous jury verdict was jeopardized. State v. Bates, 172 N.C. App. 27, 616 S.E.2d 280, 2005 N.C. App. LEXIS 1585 (2005).

Jury instruction error rendered the jury verdict fatally ambiguous, depriving defendant of defendant's constitutional right to a unanimous verdict granted by N.C. Const., Art. I, § 24. State v. Haddock, 191 N.C. App. 474, 664 S.E.2d 339, 2008 N.C. App. LEXIS 1483 (2008).

**Submission of an issue to the jury in the disjunctive is reversible error if it renders the issue ambiguous** and thereby prevents the jury from reaching a unanimous verdict. State v. Diaz, 317 N.C. 545, 346 S.E.2d 488 (1986).

A verdict of guilty following submission in the disjunctive of two or more possible crimes to the jury in a single issue is ambiguous and therefore fatally defective. State v. Diaz, 317 N.C. 545, 346 S.E.2d 488 (1986).

By instructing the jury that it could find defendant guilty of trafficking in marijuana if it found that defendant knowingly possessed or knowingly transported 10,000 pounds or more of marijuana, the trial judge submitted two possible crimes to the jury, as the jury could find defendant guilty if it found that he committed either or both of the crimes submitted to it. Thus, the jury's verdict of guilty was fatally defective because it was ambiguous, depriving defendant of his constitutional right to be convicted by a unanimous jury. State v. Diaz, 317 N.C. 545, 346 S.E.2d 488 (1986).

The trial court committed reversible error in instructing the jury that it could convict the defendant of first degree sex offense if it found that he forced the victim to perform either fellatio or anal intercourse, as defendant had a constitutional right to be convicted by the unanimous verdict of a jury in open court, and under this instruction there was no way to tell whether the defendant was convicted of second degree sexual offense because the jury unanimously agreed that the defendant engaged in fellatio, anal intercourse, both fellatio and anal intercourse, or whether some members of the jury found that he engaged in fellatio but not anal intercourse, and some found that he engaged in anal intercourse but not fellatio. State v. Callahan, 86 N.C. App. 88, 356 S.E.2d 403 (1987), aff'd, 93 N.C. App. 579, 378 S.E.2d 812 (1989).

A disjunctive jury instruction on a first-degree sexual offense did not risk a nonunanimous verdict by defining a sexual act as either cunnilingus or penetration, where the statutory definition of "sexual act" did not create disparate offenses, but merely enumerated alternative methods of showing the commission of a sexual act. State v. Petty, 132 N.C. App. 453, 512 S.E.2d 428 (1999).

Instructions in a disjunctive form on the charge of maliciously assaulting in a secret manner were fatally ambiguous, thereby resulting in an uncertain verdict in violation of defendant's right to a unanimous verdict. State v. Lyons, 330 N.C. 298, 410 S.E.2d 906 (1991).

While the evidence presented by the State tended to show that the marijuana weighed 18 pounds, defendant testified that the weight of the box was about six or seven pounds, thus, the evidence could support an inference that defendant possessed and/or transported exactly 10 pounds of marijuana, which did not qualify as trafficking in marijuana under N.C. Gen. Stat. § 90-95(h)(1)(a). Considering the evidence and erroneous jury instructions that the jury should find defendant guilty if it found that he possessed "10 pounds or more but less than 50 pounds" of marijuana, the appellate court could not conclude that the jury unanimously convicted defendant under the conduct proscribed in N.C. Gen. Stat. § 90-95(h)(1)(a). State v. Trejo, 163 N.C. App. 512, 594 S.E.2d 125 (2004).

Where the jury was instructed on alternative theories of second-degree kidnapping, some of which lacked sufficient evidentiary support, and it was unclear which theory the jury based defendant's conviction on, defendant was entitled to a new trial on the second-degree kidnapping charge. State v. Johnson, — N.C. App. —, 646 S.E.2d 123, 2007 N.C. App. LEXIS 1169 (2007).

**Unanimous Verdict of Single Offense.** — Permitting the jury to consider the DWI defendant's driving both at the time of the accident as well as when he later returned to the accident scene in his truck did not result in him being convicted on less than a unanimous verdict, since this section proscribes a single offense, not crimes in the disjunctive, and even if all jurors did not agree as to the time and extent of the defendant's drunkenness, they unanimously found him guilty of the single offense of impaired driving. State v. McCaslin, 132 N.C. App. 352, 511 S.E.2d 347 (1999).

Defendant's conviction for habitual impaired driving did not have to be overturned despite the fact that the verdict sheet given to the jury did not differentiate between the two statutory definitions of impaired driving, and thus it was not known which definition applied; the fact remained that the jury unanimously found defendant guilty of the single offense of impaired driving, which meant that defendant was not deprived of his state constitutional and state statutory right to a unanimous verdict. State v. Bradley, 181 N.C. App. 557, 640 S.E.2d 432, 2007 N.C. App. LEXIS 251 (2007).

**Capital Cases.** — Verdict of death in a capital case must be by unanimous vote of the 12 jurors. State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), overruled on other grounds, State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988).

**Trial judge correctly instructed jury** that it could find immoral, improper, or indecent liberties with a child upon a finding that defendant either improperly touched his son or induced his son to touch him; the instruction did not permit conviction by less than a unanimous verdict. State v. Hartness, 326 N.C. 561, 391 S.E.2d 177 (1990).

Trial court committed no error in its instruction to the jury concerning the charges of indecent liberties with a child and first degree sexual offense by not requiring a finding of unanimity to each charged offense. State v. Yearwood, 147 N.C. App. 662, 556 S.E.2d 672, 2001 N.C. App. LEXIS 1256 (2001).

Trial court did not err by allowing defendant to be convicted with fewer than 12 jurors finding him guilty because the trial court's use of the term "consensus" in an instruction did not violate the verdict unanimity requirement, as the trial judge twice repeated that the jury had to unanimously agree on a verdict. State v. Flemming, 171 N.C. App. 413, 615 S.E.2d 310, 2005 N.C. App. LEXIS 1260 (2005).

Trial court's disjunctive instruction on the charge of felony operation of a motor vehicle to elude arrest was not improper; while many of the enumerated aggravating factors are in fact separate crimes under various provisions of the general statutes, they are not separate offenses, but are merely alternate ways of enhancing the punishment for speeding to elude arrest from a misdemeanor to a class H felony. State v. Hazelwood, 187 N.C. App. 94, 652 S.E.2d 63, 2007 N.C. App. LEXIS 2311 (2007).

Defendant failed to show any plain error in the trial court's instructions to the jury, which charged that defendant was guilty if the jury found that he sold between 10 and 50 pounds of marijuana, because the State provided evidence that the weight of the marijuana involved in a police informant's transactions with defendant was 11 pounds and 13 pounds; the State provided evidence that the weight of the marijuana involved in a police informant's transactions with defendant was 11 pounds and 13 pounds, and because the jury was not presented with any evidence that the weight of marijuana involved was exactly 10 pounds, it was not probable that the instructional error had an impact on the jury's verdicts. State v. Charles, — N.C. App. —, 669 S.E.2d 859, 2008 N.C. App. LEXIS 2241 (2008).

**Verdict Declared Unanimous Despite Initial Unresponsiveness.** — Where the trial court, upon receiving an unresponsive answer to question concerning the unanimity of the verdict, repeated the question and received a responsive and affirmative answer, there was no ambiguity in the announcement of the verdict and defendant was convicted in the fashion provided for by the Constitution. State v. Coats, 46 N.C. App. 615, 265 S.E.2d 486, aff'd, 301 N.C. 216, 270 S.E.2d 422 (1980).

**Right to Poll Jury.** — When requested in apt time, both defendant and the prosecuting attorney for the State have a legal right to demand that the jury be polled. Davis v. State, 273 N.C. 533, 160 S.E.2d 697 (1968).

The defendant was entitled as a matter of right to know whether each juror assented to the verdict, announced by the juror who undertook to answer for the jury, and to that end he had the right to insist that a specific question be addressed to and answered by each juror in open court, as to whether he assented to said verdict. State v. Boger, 202 N.C. 702, 163 S.E. 877 (1932).

When requested in apt time, a party is entitled to have the jury polled; that is, to have an inquiry directed to each juror in order to ascertain his assent to the announced verdict. When the jury is so polled and the verdict is challenged, the record must affirmatively establish that each juror assented to the verdict entered. State v. Dow, 246 N.C. 644, 99 S.E.2d 860 (1957).

The right to have the jury polled is surely one of the best safeguards for the protection of the accused, and as an incident to jury trials would seem to be a constitutional right, and its exercise only a mode, more satisfactory to the prisoner, of ascertaining the fact that it is the verdict of the whole jury. Davis v. State, 273

N.C. 533, 160 S.E.2d 697 (1968); State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

A defendant has a constitutional right, upon timely request, to have the jury polled as a corollary to his right to a unanimous verdict. State v. Asbury, 291 N.C. 164, 229 S.E.2d 175 (1976).

The right to a poll of the jury in criminal actions is firmly established by this section and by statute. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

**Polling of Jury Described.** — The polling of the jury is a procedure whereby the jurors are asked individually the finding they have arrived at. The practice requires each juror to answer for himself, thus creating an individual response. Davis v. State, 273 N.C. 533, 160 S.E.2d 697 (1968).

A criminal defendant's right to have the jury polled is the right to have questions propounded to the jurors, individually, concerning whether each juror assented and still assents to the verdict tendered to the court. State v. Asbury, 291 N.C. 164, 229 S.E.2d 175 (1976).

**The predominant purpose of the poll** is to ascertain if the verdict as tendered by the jury is the unanimous verdict of a jury in open court, as prescribed by this section. Lipscomb v. Cox, 195 N.C. 502, 142 S.E. 779 (1928).

The object of the jury poll is to give each juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict which the foreman has returned, and thus to enable the court and the parties to ascertain with certainty that a unanimous verdict has been in fact reached and that no juror has been coerced or induced to agree to a verdict to which he has not fully assented. Davis v. State, 273 N.C. 533, 160 S.E.2d 697 (1968); State v. Asbury, 291 N.C. 164, 229 S.E.2d 175 (1976); State v. Davis, 61 N.C. App. 522, 300 S.E.2d 861 (1983).

By having the jury polled, a defendant can ascertain if there has been any misunderstanding of the requirement of unanimity by any juror. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

The rationale behind requiring that any polling of the jury be before dispersal is to ensure that nothing extraneous to the jury's deliberations can cause any of the jurors to change their minds. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

The purpose of polling the jury is to ensure that the jurors unanimously agree with and consent to the verdict at the time it is rendered. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

**Only two questions are necessary** to elicit whether the juror assented in the jury room and still assents in open court to the jury verdict. The first is: "Was this your verdict?" The addition of the second question "Is this now your verdict?" relates to the same time period addressed in the third question, "Do you still agree and assent thereto?" The second and third questions refer to the present in-court state of mind of the juror and serve only to emphasize by repetition that the crucial assent is the juror's assent to the verdict when he returns to the courtroom. State v. Asbury, 291 N.C. 164, 229 S.E.2d 175 (1976).

**Right of Juror to Dissent.** — Any juror may dissent from a verdict to which he has agreed in the jury room at any time before it is received and entered up. State v. Asbury, 291 N.C. 164, 229 S.E.2d 175 (1976).

When the verdict has been received from the foreman and has been entered, it is the duty of the clerk to cause the jury to hearken to their verdict as the court has it recorded, and to read it to them and say: "So say you all?" At this time any juror may retract on the ground of conscientious scruples, mistake, fraud, or otherwise, and his dissent would then be effectual. Davis v. State, 273 N.C. 533, 160 S.E.2d 697 (1968).

**Verdict Not Defective Where Juror Eventually Freely Assents.** — A jury verdict is not defective if it appears that a juror eventually freely assented to the verdict. State v. Asbury, 291 N.C. 164, 229 S.E.2d 175 (1976).

**Coercion of Unanimous Verdict.** — Jury could have reasonably concluded that it was required to deliberate until it reached a unanimous verdict, which was a violation of G.S. 15A-1235(c) and N.C. Const., Art. I, § 24, where the trial court encouraged deliberations despite being told three times that jury was deadlocked, and it did not address juror's request to be absent the next day so he could attend his wife's surgery. State v. Dexter, 151 N.C. App. 430, 566 S.E.2d 493, 2002 N.C. App. LEXIS 750 (2002).

A verdict is not defective if a juror understood that he or she has a right to dissent and eventually freely assented to the verdict. State v. Davis, 61 N.C. App. 522, 300 S.E.2d 861 (1983).

Trial court did not coerce the jury's verdict by instructing the deadlocked jury on acting in concert, an instruction that should have originally been included, or inquiring into the numerical division of the jury's deadlock, as the court did not address whether the majority favored conviction. State v. Williams, 185 N.C. App. 318, 648 S.E.2d 896, 2007 N.C. App. LEXIS 1824 (2007), appeal dismissed, review denied, 362 N.C. 372 (2008).

**Charge on Unanimity Not Required in Absence of Request.** — In the absence of a request, a trial judge is not required to charge the jury that its verdict must be unanimous. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

**Omission of Charge Held Harmless.** — Where the jury was polled and all the jurors assented to the verdict in open court, defendant was assured that all the jurors agreed with the verdict rendered, and the omission of the charge on unanimity was entirely harmless. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

**Selection of Alternate Juror Not Unconstitutional.** — Former G.S. 9-21 (see now G.S. 9-18) providing that the court may order the selection of an alternate juror in those cases which seem likely to be protracted, does not infringe upon this constitutional provision. State v. Dalton, 206 N.C. 507, 174 S.E. 422 (1934).

**But presence of alternate in the jury room during deliberations violates this section** and G.S. 9-18 and constitutes reversible error per se. State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975); State v. Rowe, 30 N.C. App. 115, 226 S.E.2d 231 (1976); State v. Turner, 48 N.C. App. 606, 269 S.E.2d 270 (1980).

**No Violation of Right to Unanimous Verdict.** — When a criminal jury indicated it was having difficulty reaching a verdict, the trial court's request that the jury reveal the numerical split of its vote was not a per se violation of defendant's right to a unanimous verdict, under N.C. Const., Art. I, § 24, when the trial court made it clear that it did not desire to know whether the majority was for conviction or acquittal. State v. Rasmussen, 158 N.C. App. 544, 582 S.E.2d 44, 2003 N.C. App. LEXIS 1219 (2003), cert. denied, 357 N.C. 581, 589 S.E.2d 362 (2003).

There was no risk of a lack of unanimity where defendant was charged with and convicted of the same number of offenses, and the evidence supported that number of offenses, and using the same underlying act to support convictions for both first-degree sexual offense and indecent liberties did not violate defendant's constitutional protection against double jeopardy; where the instructions told jury that it must "agree unanimously" on particular sex offenses and limited consideration of first-degree sexual offenses to the approximate dates on which they were alleged to have occurred and to a specific act, and dates and acts corresponded with the evidence, the instructions were proper and there was no lack of unanimity. State v. Brewer, 171 N.C. App. 686, 615 S.E.2d 360, 2005 N.C. App. LEXIS 1363 (2005), cert. denied, — N.C. —, 632 S.E.2d 493 (2006).

Defendant's right to an unanimous verdict under N.C. Const., Art. I, § 24, G.S. 15A-1201, and G.S. 15A-1237(b) was not violated by generic testimony, or evidence of more incidents than there were criminal charges. State v. Bullock, 178 N.C. App. 460, 631 S.E.2d 868, 2006 N.C. App. LEXIS 1572 (2006).

Defendant was found guilty by a unanimous jury where the trial judge was clear in the jury instructions that specific incident corresponded to a particular charge and that the jury must be unanimous in reaching a verdict on each charge. State v. Smith, 180 N.C. App. 86, 636 S.E.2d 267, 2006 N.C. App. LEXIS 2251 (2006).

Where the state presented sufficient evidence to support the elements of each crime charged, defendant's constitutional right to a unanimous jury was not violated despite defendant's contention that neither the jury instructions nor the verdict sheets required the jury to unanimously agree on the specific acts defendant committed to support each verdict. State v. Wallace, 179 N.C. App. 710, 635 S.E.2d 455, 2006 N.C. App. LEXIS 2166 (2006), cert. denied, appeal dismissed, 361 N.C. 436, 649 S.E.2d 896 (2007).

When defendant was convicted of contributing to the delinquency of a minor under G.S. 14-316.1, a jury did not have to unanimously agree as to the act that defendant encouraged or assisted the minor involved in the crime to commit, for which the juvenile could be adjudicated a delinquent, as long as it agreed that he encouraged or assisted the juvenile in the performance of such an act, because a conviction properly resulted from producing, promoting or contributing to any condition of delinquency, and the crime's gravamen was defendant's conduct, rather than that of the juvenile. State v. Cousart, 182 N.C. App. 150, 641 S.E.2d 372, 2007 N.C. App. LEXIS 493 (2007).

Defendant's convictions for felonious sexual act with a minor under the age of 13 and indecent liberties were erroneously reversed on the theory that it could not be said that the jury unanimously found defendant committed the same specific act to support each conviction because, while different jurors might have found defendant committed different acts of misconduct, as the evidence showed more acts of misconduct than defendant was charged with, the jury unanimously agreed that sexual misconduct occurred; thus, defendant's right to a unanimous verdict was not violated. State v. Massey, 361 N.C. 406, 646 S.E.2d 362, 2007 N.C. LEXIS 595 (2007).

Because the trial court did not give any disjunctive instruction and, in any event, the unanimity cases relied upon by defendant did not apply to a charge of conspiracy to traffic in cocaine, the trial court's instruction did not create a risk of a non-unanimous verdict. State v. Davis, 188 N.C. App. 735, 656 S.E.2d 632, 2008 N.C. App. LEXIS 278 (2008).

Because the trial court determined that a juror, who had discussed the case with another juror in a bathroom attached to the juror room, had not been intimidated or received outside information and was in agreement with the verdict reached by the jury, and no conversations had occurred outside the jury room, at most, the record established that the two jurors may have discussed the case between themselves; thus, there was no violation of the unanimity requirement. State v. Jackson, 189 N.C. App. 747, 659 S.E.2d 73, 2008 N.C. App. LEXIS 689 (2008), review denied, appeal dismissed, 668 S.E.2d 569 (2008), cert. denied, 129 S. Ct. 1532 (U.S. 2009).

Trial court's instructions allowed a jury to find defendant guilty of felony murder if it found he committed either robbery with a dangerous weapon of the store owners or robbery with a dangerous weapon of a customer. Because either of these alternative acts established an element of felony murder — namely, the commission of one of the several felonies enumerated in G.S. 14-17 — the N.C. Const., Art. 1, § 26 and G.S. 15A-1237(b) requirements of jury unanimity were satisfied. State v. Taylor, 362 N.C. 514, 669 S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

**Insufficient Evidence Regarding Jurors Praying.** — There was insufficient evidence to show the asserted ground for relief as defendant maintained in his motion for appropriate relief under G.S. 15A-1420 that two jurors had prayed together outside the jury room in his death penalty case. This was not shown to have been misconduct as defendant did not present documentary evidence. G.S. 15A-1420(b) required, that those jurors had discussed the case while they prayed, and their prayers did not constitute "deliberation" outside of the jury room, such that would have violated defendant's right to have a jury of 12 jurors under N.C. Const., Art. I, § 24. State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

### III. SELECTION OF JURORS.

**The right to trial by jury carries with it** the right to be tried before a body selected in such a manner that competing and divergent interests and perspectives in the community are reflected rather than reproduced absolutely. State v. Bowman, 349 N.C. 459, 509 S.E.2d 428 (1998), cert. denied, 527 U.S. 1040, 119 S. Ct. 2403, 144 L. Ed. 2d 802 (1999).

**Juror May Still Serve If Juror Can Lay Aside Opinion.** — Notwithstanding a juror's opinion as to how a case should be decided, a juror may still serve if the court determines that the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. State v. Mebane, 106 N.C. App. 516, 418 S.E.2d 245, cert. denied, 332 N.C. 670, 424 S.E.2d 414 (1992).

**Systematic Exclusion of Members of Defendant's Race from Grand Jury Requires Quashing of Indictment.** — This section of the Constitution requires the sustaining of a motion to quash an indictment of a defendant who proves that the members of his race have been systematically excluded from the juries of the county in which he has been indicted. State v. Peoples, 131 N.C. 784, 42 S.E. 814 (1902).

The provisions of this section and N.C. Const., Art. I, § 19 are to be so interpreted and that systematic exclusion from the grand jury of persons, otherwise qualified, because of their race, requires, upon motion duly made, the quashing of an indictment returned against a member of that race by such grand jury, irrespective of the fact that all members of the grand jury were, themselves, qualified jurors. State v. Knight, 269 N.C. 100, 152 S.E.2d 179 (1967).

**But Exclusion of Class of Persons from Jury Service Will Not Always Invalidate Indictment.** — Even the complete exclusion, by State law, of a group or class of persons from eligibility for jury service will not make invalid an indictment by a grand jury, selected in accordance with such State law, so long as there is no reasonable basis for the conclusion that the ineligible group or class would bring to the deliberations of the jury a point of view not otherwise represented upon it, at least where the defendant is not a member of the excluded group. State v. Knight, 269 N.C. 100, 152 S.E.2d 179 (1967).

**Petit juries must be drawn from a source fairly representative of the community;** however, petit juries actually chosen need not mirror the community nor reflect the various distinctive groups in the population. State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989), cert. denied, 496 U.S. 905, 110 S. Ct. 2587, 110 L. Ed. 2d 268 (1990).

**Statistics of Underrepresentation.** — Statistics concerning one jury pool, standing alone, are insufficient to show that underrepresentation of the defendant's race is due to systematic exclusion of the group in the jury selection process. State v. Bowman, 349 N.C. 459, 509 S.E.2d 428 (1998), cert. denied, 527 U.S. 1040, 119 S. Ct. 2403, 144 L. Ed. 2d 802 (1999).

A jury venire of only 8.3% African-Americans, where the census for the county revealed that African-Americans comprised 16.15% of the county's population, did not encroach on the defendant's constitutional right to be tried by a jury of his or her peers, where he did not allege systematic exclusion, only that the court should have taken affirmative steps to ensure that the jury venire called for his trial was racially proportionate; a 7.85% difference, standing alone, did not render the jury venire constitutionally infirm. State v. Blakeney, 352 N.C. 287, 531 S.E.2d 799, 2000 N.C. LEXIS 528 (2000), cert. denied, 531 U.S. 1117, 121 S. Ct. 868, 148 L. Ed. 2d 780 (2001).

**Showing Disproportionate Racial Representation.** — To establish a prima facie case of disproportionate representation of a defendant's race in a jury venire, a defendant must show: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the group representation in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. State v. Bowman, 349 N.C. 459, 509 S.E.2d 428 (1998), cert. denied, 527 U.S. 1040, 119 S. Ct. 2403, 144 L. Ed. 2d 802 (1999).

**Evidence of Racial Exclusion Held Insufficient.** — Mere statement in defendant's brief that the systematic maneuverings of the prosecutor excluded persons of defendant's race from the jury, which was not supported by the record, failed to show that members of defendant's race were systematically or arbitrarily excluded from the jury panel. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

The defendant failed to make a prima facie case of racially motivated peremptory challenges, where the State was willing to accept 40% of the blacks tendered. State v. Abbott, 320 N.C. 475, 358 S.E.2d 365 (1987).

Defendant found guilty of murder and robbery failed to establish a prima facie case of racial discrimination in the State's use of its peremptory challenges where the State's questions during voir dire focused on the prospective juror's feelings about capital punishment and the age of the juror, or his or her children, as compared with defendant's age; the venire persons were brought into the courtroom individually, so neither defendant nor the State knew how many black citizens were present in the venire or whether a black citizen would be examined next, and three of the first four jurors seated were black, as were both defendant and the victim, thus diminishing the likelihood that racial issues were inextricably bound up with the conduct of the trial. State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989), cert. denied, 496 U.S. 905, 110 S. Ct. 2587, 110 L. Ed. 2d 268 (1990).

A small sample of 40 jurors from the master list of jurors of a county alone was insufficient to establish a systematic exclusion of blacks from the jury pool. State v. McNeill, 326 N.C. 712, 392 S.E.2d 78 (1990).

**Use of a jury box containing only the names of property owners** was not per se discriminatory and did not unfairly narrow the choice of jurors so as to impinge on defendant's statutory or constitutional rights. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969), cert. denied, 396 U.S. 1024, 90 S. Ct. 599, 24 L. Ed. 2d 518 (1970).

**Exclusion of Age Group from Jury List.** — The absence from the jury list of the names of persons between the ages of 18 and 21 during the period from July, 1971, the effective date of the amendment of G.S. 9-3 lowering the age requirement for jurors from 21 years to 18 years, and September, 1971, the date of defendants' trial, was not unreasonable and did not constitute systematic exclusion of this age group from jury service. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

**Failure of defendant in a criminal prosecution to exhaust his peremptory challenges** does not affect his right to attack an illegally constituted jury. State v. Emery, 224 N.C. 581, 31 S.E.2d 858 (1944).

**The erroneous allowance of an improper challenge for cause** does not entitle the adverse party to a new trial, so long as only those who are competent and qualified to serve are actually empaneled upon the jury which tried his case. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

**Challenge of Jurors for Opposition to Death Penalty.** — In a first degree murder prosecution, the trial court properly sustained the State's challenge for cause to each juror who stated that in no event and under no circumstances could he render a verdict of guilty against any person, regardless of the evidence, if the punishment was death. State v. Miller, 276 N.C. 681, 174 S.E.2d 481 (1970), death penalty vacated, 408 U.S. 937, 92 S. Ct. 2863, 33 L. Ed. 2d 755 (1972).

As to exclusion of jurors who voiced objections to death penalty, see also, State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

Death qualification of jurors does not violate this Article. State v. Smith, 320 N.C. 404, 358 S.E.2d 329 (1987).

"Death qualifying" juries in capital cases violates neither the United States Constitution nor the North Carolina Constitution. State v. Strickland, 321 N.C. 31, 361 S.E.2d 882 (1987).

It was not error under N.C. Const., Art. I, § 19 or this section for the prosecution to use its peremptory challenges to excuse veniremen who had qualms about the death penalty but were not excludable pursuant to Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776, rehearing denied, 393 U.S. 898, 89 S. Ct. 67, 61 L. Ed. 2d 186 (1968). State v. Allen, 323 N.C. 208, 372 S.E.2d 855 (1988), sentence vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990), in light of People ex rel. Boyer v. Teague, 106 N.C. 576, 11 S.E. 665 (1890), rehearing denied.

**A defendant has no vested right to a particular juror.** State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

**But Only to Reject Prejudiced Jurors.** — When no systematic exclusion is shown, defendant's right is only to reject a juror prejudiced against him; he has no right to select one prejudiced in his favor. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

**The presence on the jury of a judge** who had earlier presided over the defendant's arraignment, granted the defendant time to file motions and initiate discovery, and set the case for trial, violated the defendant's right to trial by a jury of 12, a right which is inalienable in North Carolina, and denied him liberty without due process of law, and the fact that neither party challenged the judge's presence on the jury was irrelevant. Cox v. Turlington, 648 F. Supp. 1553 (E.D.N.C. 1986).

Defendant's constitutional right to an impartial jury was violated as a magistrate served on defendant's jury while having personal knowledge of defendant's prior drug charges and after having direct pretrial involvement with the charges for which the magistrate participated in deciding defendant's guilt or innocence. State v. Neal, — N.C. App. —, 674 S.E.2d 713, 2009 N.C. App. LEXIS 373 (2009).

**Equal Access to Criminal Records of Jurors.** — An indigent defendant's lack of access to the Police Information Network (PIN) did not deny the defendant equal access to information in violation of this section of the North Carolina Constitution, where the court suggested alternative means to obtaining such information on jurors and the defendant's counsel did not subsequently object to the trial court's action or move for funds with which the defense could run its own criminal record checks. State v. Smith, 352 N.C. 531, 532 S.E.2d 773, 2000 N.C. LEXIS 617 (2000), cert. denied, 532 U.S. 949, 121 S. Ct. 1419, 149 L. Ed. 2d 360 (2001).

**Right to Impartial Jury.** — Trial court's conduct at a suppression hearing in asking a police officer an additional question regarding the officer's investigative stop of defendant in a case where defendant was charged with and pled guilty to habitual driving while impaired did not violate defendant's right to trial by a jury; the question did not show that the trial court was partial to the State's case, but, instead, showed that the trial court was trying to understand the "whole picture on what happened," even if the question was outside the scope of what was appropriate for such a hearing. State v. Jones, 186 N.C. App. 405, 651 S.E.2d 589, 2007 N.C. App. LEXIS 2200 (2007).

## IV. PETTY MISDEMEANORS.

**Purpose.** — The purpose of conferring on the legislature power to provide means of trial other than by jury for petty misdemeanors is to avoid the inconvenience, expense and delay attendant upon indictment by the grand jury and the trial by the jury where the parties choose to waive it, in the ordinary course of criminal procedure. State v. Crook, 91 N.C. 536 (1884). See also, State v. Boykin, 211 N.C. 407, 191 S.E. 18 (1937).

**Indictment by grand jury is dispensed with** in the trial of petty misdemeanors under this section. State v. Lytle, 138 N.C. 738, 51 S.E. 66 (1905).

**Legislature May Provide Other Means of Trial.** — The provisions of this section empower the legislature to provide means other than petit juries for the trial of petty misdemeanors, with the right of appeal. State v. Thomas, 236 N.C. 454, 73 S.E.2d 283 (1952); State v. Underwood, 244 N.C. 68, 92 S.E.2d 461 (1956).

The legislature has power to designate the unlawful possession and transportation of intoxicants a petty misdemeanor and to provide means of trial for the offense other than by indictment and trial by jury. State v. Shine, 222 N.C. 237, 22 S.E.2d 447 (1942).

**In Inferior Courts.** — It is permissible under this section for the General Assembly to provide for the trial of petty misdemeanors in inferior courts with the right of appeal to the superior court. State v. Lytle, 138 N.C. 738, 51 S.E. 66 (1905); State v. Brittain, 143 N.C. 668, 57 S.E. 352 (1907); State v. Hyman, 164 N.C. 411, 79 S.E. 284 (1913); State v. Tate, 169 N.C. 373, 85 S.E. 383 (1915); State v. Pasley, 180 N.C. 695, 104 S.E. 533 (1920); State v. Camby, 209 N.C. 50, 182 S.E. 715 (1935).

**With Jury Trial De Novo on Appeal.** — The only exception to the rule that nothing can be a conviction but the verdict of a jury is the constitutional authority granted the General Assembly to provide for the initial trial of misdemeanors in inferior courts without a jury, with trial de novo by a jury upon appeal. State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

**The constitutional right of a defendant charged with a misdemeanor to have a jury trial is not infringed** by the fact that he has first to submit to trial without a jury in the district court and then appeal to superior court in order to obtain a jury trial. State v. Sherron, 4 N.C. App. 386, 166 S.E.2d 836 (1969).

**Right to Jury Trial Is Preserved by Requirement of Trial De Novo on Appeal.** — The right of a trial by jury in a criminal action is preserved to the accused by the statutory requirement of a trial de novo in the superior court on appeal from a court of subordinate jurisdiction, and conviction in the superior court cannot be had unless upon the verdict of the jury, in accordance with the provisions of this section of the Constitution. State v. Pulliam, 184 N.C. 681, 114 S.E. 394 (1922).

The constitutional guaranty of a jury trial is met by the right of appeal which is given from an inferior court, in all cases, to the superior court. State v. Lytle, 138 N.C. 738, 51 S.E. 66

(1905). See also, State v. Hyman, 164 N.C. 411, 79 S.E. 284 (1913).

**And Thus Jury Trials May Be Abolished in Inferior Courts.** — Where defendants have the right to appeal to the superior court and obtain a trial de novo before a petit jury, the General Assembly may abolish jury trials in an inferior court by a direct enactment to that effect without transgressing this section. State v. Norman, 237 N.C. 205, 74 S.E.2d 602 (1953).

**Waiver of Right of Appeal.** — A person on trial for a misdemeanor in an inferior court with right of appeal to the superior court may waive his constitutional right to a trial by jury by consenting to the judgment therein entered, or by not appealing therefrom, and the fact that afterwards he employs an attorney and moves for appeal within the time allowed by the applicable statute will not affect the fact that he had personally acquiesced in the judgment entered. State v. Lakey, 191 N.C. 571, 132 S.E. 570 (1926).

Where, in a prosecution in the recorder's court for wilful failure to support his illegitimate child, defendant complied with the terms of the suspended judgment by making two payments according to its terms, paying the costs of court, and executing a compliance bond pursuant to the terms of the judgment, he would be deemed to have knowingly and intelligently waived his statutory right to appeal to the superior court. State v. Cooke, 268 N.C. 201, 150 S.E.2d 226 (1966).

**Appellate Court May Increase Punishment in Trial De Novo.** — Upon appeal from an inferior court for a trial de novo in the superior court, the superior court may impose punishment in excess of that imposed in the inferior court provided the punishment imposed does not exceed the statutory maximum. State v. Harrell, 281 N.C. 111, 187 S.E.2d 789 (1972).

**Transfer of Untried Misdemeanors.** — For case holding that statutes purporting to authorize the transfer of untried misdemeanor cases from an inferior court to the superior court and the initial trial of such transferred cases in the superior court upon the warrant of the inferior court repugnant to the declaration inherent in the second sentence of this section, that a person charged with the commission of a misdemeanor cannot be put on trial in the superior court upon the warrant of an inferior court unless he has been tried upon such warrant in the inferior court and has appealed from that court to the superior court, see State v. Thomas, 236 N.C. 454, 73 S.E.2d 283 (1952).

**Assault and battery is not a petty misdemeanor** within the proviso to this section. State v. Stewart, 89 N.C. 563 (1883); Schick v. United States, 195 U.S. 65, 24 S. Ct. 826, 49 L. Ed. 99 (1904).

## Sec. 25. Right of jury trial in civil cases.

In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable.

**Cross References.** — As to jury trials and waiver of same in civil cases, see G.S. 1A-1, Rules 38 and 39.

**History.** — The provisions of this section are similar to those of the first sentence of Art. I, § 19, Const. 1868, as amended in 1946.

**Legal Periodicals.** — As to less than unanimous jury verdicts in civil cases, see 27 N.C.L. Rev. 539 (1949).

For note on the power of the court to increase a jury award by additur, see 37 N.C.L. Rev. 169 (1959).

For case law survey as to indictment and trial by jury, see 45 N.C.L. Rev. 878 (1967).

For note on directed verdicts in favor of the party with the burden of proof, see 16 Wake Forest L. Rev. 607 (1980).

For survey of 1981 constitutional law, see 60 N.C.L. Rev. 1272 (1982).

### CASE NOTES

I. In General.
II. Specific Proceedings.

### I. IN GENERAL.

***Editor's Note.*** — *Some of the cases cited below were decided under former Art. I, § 19, Const. 1868, before and after its amendment in 1946.*

**This Section Applicable to Actions Respecting Property Only.** — Though this section contains no such qualifications, it has been construed to apply only to actions respecting property in which the right to a jury trial existed either at common law, or by statute before the 1868 Constitution became operative; for actions created since then, the right to a

jury trial depends upon statutory authority. State ex rel. Rhodes v. Simpson, 91 N.C. App. 517, 372 S.E.2d 312 (1988), rev'd on other grounds, 325 N.C. 514, 385 S.E.2d 329 (1989).

**Cap on Punitive Damages.** — Section 1D-25, which places a cap on punitive damages, does not violate injured parties' rights to a jury trial, because their right to punitive damages is not a property interest, and they only have a right to a civil jury trial concerning property. Rhyne v. K-Mart Corp., 149 N.C. App. 672, 562 S.E.2d 82, 2002 N.C. App. LEXIS 316 (2002), aff'd, 358 N.C. 160, 594 S.E.2d 1 (2004).

Although N.C. Const. art. I, § 25 appears to embody a broad definition of the term ""property," a controversy in which punitive damages are assessed is not one which enforces a plaintiff's legal rights and, therefore, does not respect property; thus, G.S. 1D-25 in no way infringes upon plaintiffs' right to a trial by jury under N.C. Const. art. 1, § 25. Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004).

**Section Compared to N.C. Const., Art. IV, § 13.** — There is not a conflict between this section and N.C. Const., Art. IV, § 13, but Art. IV, § 13 is more comprehensive. Faircloth v. Beard, 320 N.C. 505, 358 S.E.2d 512 (1987), overruled in part, Jacobs v. City of Asheville, 137 N.C. App. 441, 528 S.E.2d 905 (2000).

**This section and N.C. Const., Art. IV, § 13 must be read in conjunction with one another.** N.C. Const., Art. IV, § 13 merely establishes the form and procedure for the trial of all civil actions, including the procedure of having issues of fact decided by a jury in what were formerly equity proceedings; to determine whether there exists a constitutional right to trial by jury of a particular cause of action, one looks to this section, which ensures that there is a right to trial by jury where the underlying cause of action existed at the time of adoption of the 1868 Constitution, regardless of whether the action was formerly a proceeding in equity. Kiser v. Kiser, 325 N.C. 502, 385 S.E.2d 487 (1989).

**"Jury".** — The word "jury" is to be given the signification which it had when the Constitution was adopted, i.e., a body of 12 men in a court of justice duly selected and impaneled in the case to be tried. State v. Emery, 224 N.C. 581, 31 S.E.2d 858 (1944), decided prior to the 1946 amendment to Art. I, § 19, Const. 1868, which amendment provided that no person should be excluded from jury service on account of sex.

**"Trial".** — The word "trial" refers to a dispute and issue of fact, and the expression "trial by jury," as used in this section, does not necessarily signify that every legal controversy is to be determined by a jury. Board of County Comm'rs v. George, 182 N.C. 414, 109 S.E. 77 (1921).

**Similarity to Art. I, § 19, Const. 1868.** — The provisions of this section are similar to the provisions of the first sentence of Art. I, § 19 of the Constitution of 1868. In re Annexation Ordinance, 284 N.C. 442, 202 S.E.2d 143 (1974).

**For examination of historical development** of the right to trial by jury, see Kiser v. Kiser, 325 N.C. 502, 385 S.E.2d 487 (1989).

**The ancient mode of trial by jury has been preserved** in the present Constitution. Chesson v. Kieckhefer Container Co., 223 N.C. 378, 26 S.E.2d 904 (1943).

**History teaches that a jury can best settle factual controversies,** and for that reason jury trials ought to remain sacred and inviolable. Mangum v. Yow, 263 N.C. 525, 139 S.E.2d 537 (1965).

**Right to Jury Trial Is Guaranteed.** — The Constitution of North Carolina guarantees to every litigant the sacred and inviolable right to demand a trial by jury of the issues of fact arising in all controversies respecting property, and he cannot be deprived of this right except by his own consent. Scott Poultry Co. v. Bryan Oil Co., 272 N.C. 16, 157 S.E.2d 693 (1967); Mathias v. Brumsey, 27 N.C. App. 558, 219 S.E.2d 646 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

This section guarantees to every person the "sacred and inviolable" right to demand a jury trial of issues of fact arising in all controversies at law respecting property. Sykes v. Belk, 278 N.C. 106, 179 S.E.2d 439 (1971).

This section has been construed to guarantee trial by jury in all civil actions where the parties have not waived the right. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

**But Only in Certain Cases.** — This constitutional provision applies only to cases in which the prerogative existed at common law or by statute at the time the Constitution of 1868 was adopted. Chowan & S.R.R. v. Parker, 105 N.C. 246, 11 S.E. 328 (1890); Groves v. Ware, 182 N.C. 553, 109 S.E. 568 (1921); Belk's Dep't Store, Inc. v. Guilford County, 222 N.C. 441, 23 S.E.2d 897 (1943); Kaperonis v. North Carolina State Hwy. Comm'n, 260 N.C. 587, 133 S.E.2d 464 (1963); In re Estate of Wallace, 267 N.C. 204, 147 S.E.2d 922 (1966); In re Northwestern Bonding Co., 16 N.C. App. 272, 192 S.E.2d 33, appeal dismissed, 282 N.C. 426, 192 S.E.2d 837 (1972); In re Taylor, 25 N.C. App. 642, 215 S.E.2d 789 (1975); In re Foreclosure of Deed of Trust, 46 N.C. App. 654, 266 S.E.2d 686 (1980); North Carolina State Bar v. DuMont, 304 N.C. 627, 286 S.E.2d 89 (1982).

The right to a trial by jury as provided in this section applies only to cases in which the prerogative existed at common law or was procured by statute at the time the Constitution was adopted, and not to those in which the right and the remedy are thereafter created by statute. Thus, this section cannot be invoked to deprive a public official of the discretion with which he is clothed by legislative enactment. Groves v. Ware, 182 N.C. 553, 109 S.E. 568 (1921); McInnish v. Board of Educ., 187 N.C. 494, 122 S.E. 182 (1924).

The right to trial by jury as provided for by this section applies only to cases in which the prerogative existed at common law or was procured by statute at the time the Constitution was adopted. The right does not apply to cases in which a right and remedy were thereafter created by statute. State v. Morris, 103 N.C. App. 246, 405 S.E.2d 351 (1991).

**The relevant date for determining the scope of the constitutional right to jury trial** in civil cases is the date of adoption of the 1868 Constitution. North Carolina State Bar v. DuMont, 304 N.C. 627, 286 S.E.2d 89 (1982); State v. Morris, 103 N.C. App. 246, 405 S.E.2d 351 (1991).

**Right Not Absolute.** — Constitutional right to a jury trial preserved in G.S. 1A-1, Rule 53(b)(2) was not absolute, as the right was premised upon a preliminary determination by the trial judge that there indeed existed genuine issues of fact and credibility which required submission to the jury, and, in certain cases, credibility was manifest as a matter of law, but no general rule could be stated to determine whether credibility was manifest in a particular case. Dockery v. Hocutt, 357 N.C. 210, 581 S.E.2d 431, 2003 N.C. LEXIS 596 (2003).

Trial court did not err in denying the one child's request for a jury trial on the one child's motion for sanctions against the second child and wife regarding the counterclaim that they filed; the motion for sanctions was not an action regarding a property right, and thus the one child did not have a constitutional right to a jury, and in any event the evidence did not support the entry of sanctions. Hill v. Hill, 181 N.C. App. 69, 638 S.E.2d 601, 2007 N.C. App. LEXIS 65 (2007), appeal dismissed, cert. denied, 361 N.C. 427, 648 S.E.2d 502, 503.

**Right Applies Only in Cases Involving Fact Issues.** — This section does not confer the right to demand the intervention of a jury absolutely and unqualifiedly, but only in cases involving issues of fact. McQueen v. Peoples Nat'l Bank, 111 N.C. 509, 16 S.E. 270 (1892).

The constitutional right to trial by jury is not absolute; rather, it is premised upon a preliminary determination by the trial judge that there indeed exist genuine issues of fact and credibility which require submission to the jury. Therefore, the right to jury trial is not an impediment to directing a verdict for that party with the burden of proof where the credibility of the movant's evidence is manifest as a matter of law. North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979).

**In Actions Where Legal Rights Are Involved.** — The right to trial by jury applies exclusively to actions in which legal rights are involved. State ex rel. Utilities Comm'n v. Great S. Trucking Co., 223 N.C. 687, 28 S.E.2d 201 (1943) (concurring opinion).

**The credibility of testimony is for the jury,** not the court, and a genuine issue of fact must be tried by a jury unless this right is waived. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

Summary judgment may not be granted in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses. Shearin v. National Indem. Co., 27 N.C. App. 88, 218 S.E.2d 207 (1975).

**Jury Trial Not Required at Each Stage of Proceedings.** — This section, guaranteeing the right of trial by jury in "controversies at law respecting property," includes equitable and legal elements involved in the determination of the issues made by the pleadings, but it is not required that a trial by jury be had at each stage of the proceedings when this right has elsewhere therein been properly safeguarded by statute. Board of County Comm'rs v. George, 182 N.C. 414, 109 S.E. 77 (1921).

**Court May Not Determine Fact Issues.** — Right to a jury trial is guaranteed by this section, and where the parties do not consent to trial by the court, the court may not determine, prior to the introduction of evidence, an issue of fact joined by the pleadings. Hershey Corp. v. Atlantic C.L.R.R., 207 N.C. 122, 176 S.E. 265 (1934).

It was error for the trial court to determine issues of fact raised by the pleadings in the absence of waiver of the constitutional and statutory right to a trial by jury, there being no question of reference. Sparks v. Sparks, 232 N.C. 492, 61 S.E.2d 356 (1950).

Where there was nothing in the record to indicate that petitioner and respondent had waived their constitutional and statutory right to have issue of fact joined on the pleadings tried by a jury, and there was no question of reference, the judge had no authority to enter an order affirming the order of the assistant clerk of the superior court, which in effect was a determination by the judge of the issue of fact raised by the pleadings and a finding by him that money deposited in the office of the clerk of the superior court was funds belonging to decedent and an order that said money be distributed to the administrator c.t.a. of her last will and testament. In re Estate of Wallace, 267 N.C. 204, 147 S.E.2d 922 (1966).

**Nor Enter Judgment Without Aid of Jury on Issues of Fact.** — Where the parties to a civil action do not waive trial by jury nor consent that the judge find the facts, it is error for the judge to enter judgment without the aid of the jury on the controverted issues of fact raised by the pleadings. Icenhour v. Bowman, 233 N.C. 434, 64 S.E.2d 428 (1951).

**When Judgment of Dismissal Offends Plaintiff's Right to Jury Trial.** — Judgment of dismissal of plaintiff's action offends against plaintiff's constitutional right of jury trial where these factors come into focus: (1) The record discloses no stipulation by which jury trial was waived or consent was given for the court to find facts; (2) the plaintiff's evidence was sufficient to make out a prima facie case in accordance with the allegations of the complaint; (3) the defendant offered no evidence; (4) the plaintiff's evidence does not establish the truth of the defendant's affirmative defense. Ingle v. McCurry, 243 N.C. 65, 89 S.E.2d 745 (1955).

**Where there is more than a scintilla of evidence** to sustain the allegations of the complaint, the case must be submitted to the jury, its sufficiency to warrant a verdict for plaintiff being for the determination of the jury, subject only to the discretionary power of the trial court to set the verdict aside in proper cases, and a strict adherence to this rule is necessary to preserve the right of trial by jury guaranteed under this section. Fox v. Asheville Army Store, Inc., 215 N.C. 187, 1 S.E.2d 550 (1939).

**Burden of Proof Between the Parties.** — The rules of law as to the burden of proof between the parties to litigation respecting damages to property resulting from negligence is one of substantial right guaranteed by the federal Constitution, and more emphatically by this section of the State Constitution. McDowell v. Norfolk S.R.R., 186 N.C. 571, 120 S.E. 205, 42 A.L.R. 857 (1923).

**Power of Court to Increase Jury Award by Additur.** — While it may be suggested that the practice of additur deprives a defendant of his constitutional right to a jury trial, guaranteed by this section, the obvious answer is that the defendant may waive that right, which he does when he consents to pay the additur, since in this State the parties to a civil action have a right to waive a jury trial. Caudle v. Swanson, 248 N.C. 249, 103 S.E.2d 357 (1958).

**Compulsory Reference.** — Every litigant has the constitutional right of trial by jury unless he voluntarily waives it, and, in case of a compulsory reference made to facilitate the trial of a cause, he may renew his demand for a jury trial by excepting to the report of the referee and pointing out the findings so excepted to as a basis for issues. State ex rel. Wilson v. Featherstone, 120 N.C. 446, 27 S.E. 124 (1897).

A compulsory reference, under former G.S. 1-189, did not deprive either party of his constitutional right to a trial by jury of the issues of fact arising on the pleadings, but such trial was only upon the written evidence taken before the referee. Resort Dev. Co. v. Phillips, 278 N.C. 69, 178 S.E.2d 813 (1971).

Although when a court orders a compulsory reference, a party preserves his right to trial by complying with the procedural steps outlined in G.S. 1A-1, Rule 53, the party is entitled to trial by jury only if the evidence before the reference was sufficient to raise an issue of fact. Fauchette v. Zimmerman, 79 N.C. App. 265, 338 S.E.2d 804 (1986).

**Admission of hearsay evidence does not violate the confrontation clause when declarant is unavailable to testify** and his statement bears adequate indicia of reliability. Thus, in a trial for taking indecent liberties with a four-year-old child, admission of evidence admissible under established exception to the hearsay rule did not violate defendant's right of confrontation under this section. State v. Jones, 89 N.C. App. 584, 367 S.E.2d 139 (1988).

**Polling Jury in Civil Actions.** — Under this section, the losing party in a civil action may demand a polling of the jury upon the return of the verdict, as a matter of right. Culbreth v. Borden Mfg. Co., 189 N.C. 208, 126 S.E. 419 (1925).

Upon the coming in of the verdict in a civil action, either party to the action has the constitutional right to have the jury polled before accepting the verdict as a unanimous one. In re Will of Sugg, 194 N.C. 638, 140 S.E. 604 (1927).

**Waiver of Right to Jury Trial Strictly Construed.** — It is a general rule, since the right of trial by jury is highly favored, that waivers of the right are always strictly construed and are not to be lightly inferred or extended by implication, whether with respect to a civil or criminal case. Mathias v. Brumsey, 27 N.C. App. 558, 219 S.E.2d 646 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

**And Will Not Be Presumed.** — There can be no presumption of a waiver of trial by jury where such a trial is provided for by law. Thus, in the absence of an express agreement or consent, a waiver of the right to a jury trial will not be presumed or inferred. Indeed, every reasonable presumption should be made against waiver. Mathias v. Brumsey, 27 N.C. App. 558, 219 S.E.2d 646 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

**How Jury Trial May Be Waived.** — A party may waive his right to jury trial by (1) failing to appear at the trial, (2) written consent filed with the clerk, (3) oral consent entered in the minutes of the court, (4) failing to demand a jury trial pursuant to G.S. 1A-1, Rule 38(b). Sykes v. Belk, 278 N.C. 106, 179 S.E.2d 439 (1971).

**There is no constitutional impediment to arbitration agreements.** Miller v. Two State Constr. Co., 118 N.C. App. 412, 455 S.E.2d 678 (1995).

**An agreement to arbitrate a dispute is not an unenforceable contract requiring waiver of a jury;** thus, the trial court erred in concluding that because arbitration provision did not provide for trial of facts by a jury that it was unconscionable and unenforceable under G.S. 22B-10, and in violation of N.C. Const., Art. I, § 18 and 25. Miller v. Two State Constr. Co., 118 N.C. App. 412, 455 S.E.2d 678 (1995).

**Applied** in Brondum v. Cox, 30 N.C. App. 35, 226 S.E.2d 193 (1976); Brondum v. Cox, 292 N.C. 192, 232 S.E.2d 687 (1977); Huyck Corp. v. C.C. Mangum, Inc., 309 N.C. 788, 309 S.E.2d 183 (1983); Williams & Michael, P.A. v. Kennamer, 71 N.C. App. 215, 321 S.E.2d 514 (1984); Jackson v. Lundy Packing Co., 72 N.C. App. 337, 324 S.E.2d 290 (1985); Phillips v. Phillips, 73 N.C. App. 68, 326 S.E.2d 57 (1985); In re McCarroll, 313 N.C. 315, 327 S.E.2d 880 (1985); Carolina Forest Ass'n v. White, — N.C. App. —, 678 S.E.2d 725, 2009 N.C. App. LEXIS 1066 (July 7, 2009).

**Cited** in Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972); Branch v. Branch, 282 N.C. 133, 191 S.E.2d 671 (1972); Nash County Bd. of Educ. v. Biltmore Co., 464 F. Supp. 1027 (E.D.N.C. 1978); Fogleman v. Fogleman, 41 N.C. App. 597, 255 S.E.2d 269 (1979); Dowat, Inc. v. Tiffany Corp., 83 N.C. App. 207, 349 S.E.2d 610 (1986); Ragan v. County of Alamance, 98 N.C. App. 636, 391 S.E.2d 825 (1990); In re Alamance County Ct. Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991); Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 597 S.E.2d 674, 2004 N.C. LEXIS 667 (2004); State v. Price, — N.C. App. —, 611 S.E.2d 891 (2005).

## II. SPECIFIC PROCEEDINGS.

**Party Charged with Maintaining Nuisance Has Right to Jury Trial.** — A party charged with the maintenance of a public nuisance has a right to traverse the factual allegations of the complaint. If he does so, he cannot be deprived of his right to a jury trial on the issues raised by the pleadings. State ex rel. Bowman v. Malloy, 264 N.C. 396, 141 S.E.2d 796 (1965).

**Damage Cases.** — In an action for damages for negligently setting fire to plaintiff's woods by sparks from defendant's engine, it was held that this section guaranteed, as a "sacred and inviolable" right, that the plaintiff might have the case submitted to the jury. Williams v. Atlantic C.L.R.R., 140 N.C. 623, 53 S.E. 448 (1906).

**Arbitration.** — Arbitration judgment was not void as a violation of an injured party's right to jury trial under G.S. 1A-1, Rule 38 and 39, N.C. Const. art. I, § 25 or U.S. Const. amend. VII, because her right to a jury trial was protected by N.C. R. Arb. 5(a), which allowed any party to have a trial de novo upon written demand filed within 30 days of the arbitrator's award. Clendening v. Sears, Roebuck & Co., — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 2114 (Aug. 20, 2002).

**Under Workers' Compensation Act, trial by jury is not a constitutional right.** Hagler v. Mecklenburg Hwy. Comm'n, 200 N.C. 733, 158 S.E. 383 (1931).

**Injunction Action Under CAMA and Dredge and Fill Act.** — Trial court erred in granting defendant's demand for a jury trial in state-initiated proceeding seeking mandatory injunctive relief under Coastal Area Management Act (CAMA) and the Dredge and Fill Act for the removal of fill material on defendant's property; an action such as this neither existed at common law nor by statute at the time of the adoption of the Constitution of 1868; therefore, this section did not apply. State ex rel. Rhodes v. Simpson, 325 N.C. 514, 385 S.E.2d 329 (1989).

**Actions Under ERISA.** — Preemptive effect of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., does not abridge the right to a jury trial under this section in an action to recover benefits due under 29 U.S.C. § 1132(a)(1)(B). Overcash v. Blue Cross & Blue Shield, 94 N.C. App. 602, 381 S.E.2d 330 (1989).

The right to a jury trial under the law of this State does not conflict with any of the substantive provisions of the Employee Retirement Income Security Act; therefore, State law would control and plaintiff was entitled to have factual controversy in his action for benefits due under an insurance contract submitted to a jury. Overcash v. Blue Cross & Blue Shield, 94 N.C. App. 602, 381 S.E.2d 330 (1989).

**Eminent Domain Proceeding Is Not Controversy Concerning Property.** — A proceeding to assess damages for the taking of land by eminent domain is not a controversy concerning property within the meaning of this section. Kaperonis v. North Carolina State Hwy. Comm'n, 260 N.C. 587, 133 S.E.2d 464 (1963).

**Since Ownership Is Not in Issue in Eminent Domain.** — This section is a constitutional guaranty of jury trial when the issue determinative of the rights of the litigants is: "Who owns the land, plaintiff or defendant?" This issue does not arise when the State, or its agency, exercises the power of eminent domain. The phrase "eminent domain" by definition admits condemnor did not own, but took or appropriated the property of another for a public purpose. Wescott v. State Hwy. Comm'n, 262 N.C. 522, 138 S.E.2d 133 (1964).

**Provisions Establishing Conditions for Jury Trial in Small Claims Court.** — The provisions of Session Laws 1951, c. 1057, setting up the procedure for adjudicating small claims in the Superior Court of Forsyth County, to the effect that no jury trial shall be had in an action instituted pursuant thereto, unless a demand is made therefor in the manner set out in the act, and the costs advanced and the prosecution bond filed as required therein, were not unreasonable provisions and did not violate this section. Better Home Furn. Co. v. Baron, 243 N.C. 502, 91 S.E.2d 236 (1956).

**Proceedings for Alimony, etc.** — When in proceedings for alimony without divorce the pleadings raise the issues of the validity of marriage between the parties, or whether the husband had separated himself from the wife and failed to provide her suitable or reasonable sustenance, or whether the husband is a drunkard or spendthrift under former G.S. 50-16, the right of trial by jury arises to the defendant, and the case should be transferred by the judge to the civil issue docket for the purpose. Crews v. Crews, 175 N.C. 168, 95 S.E. 149 (1918).

Provisions of former G.S. 50-16, empowering the court to allow subsistence and counsel fees pendente lite to plaintiff in an action for alimony without divorce, did not violate this section. Peele v. Peele, 216 N.C. 298, 4 S.E.2d 616 (1939).

**Proceedings to Terminate Parental Rights.** — The North Carolina constitutional requirement of trial by jury is not applicable to a proceeding for termination of parental rights. In re Ferguson, 50 N.C. App. 681, 274 S.E.2d 879 (1981).

**Equitable Distribution Action.** — No right to bring an action for equitable distribution of marital property existed prior to the adoption of the equitable distribution statutes, G.S. 50-20 and G.S. 50-21, and the language of the statutes themselves create no new right to trial by jury; therefore, there is no right to trial by jury for such an action under the Constitution of North Carolina. Kiser v. Kiser, 325 N.C. 502, 385 S.E.2d 487 (1989).

**The Date of Separation in the Context of Equitable Distribution.** — In the context of equitable distribution, defendant does not have a right to jury trial on the issue of the date of separation when he seeks a divorce from bed and board. No such constitutional right exists nor has the legislature statutorily provided for such a right when it drafted the equitable distribution statutes although the date of separation is a jury-triable issue within the absolute divorce context. McCall v. McCall, 138 N.C. App. 706, 531 S.E.2d 894, 2000 N.C. App. LEXIS 795 (2000).

**Appraisal.** — Plaintiff's right under the North Carolina Constitution to trial by jury was not abridged by the appraisal clause. Bentley v. North Carolina Ins. Guar. Ass'n, 107 N.C. App. 1, 418 S.E.2d 705 (1992).

Notwithstanding this provision, the North Carolina Supreme Court has repeatedly approved appraisal as a means of settling the single issue of amount of loss sustained by an insured. Bentley v. North Carolina Ins. Guar. Ass'n, 107 N.C. App. 1, 418 S.E.2d 705 (1992).

**Condemnation.** — Where a matter was called for hearing pursuant to G.S. 136-108 in a condemnation action with no jury, this hearing did not infringe upon the landowner's right to a jury trial as provided by the North Carolina and United States Constitutions. DOT v. Wolfe, 116 N.C. App. 655, 449 S.E.2d 11 (1994).

Denial of a co-owner's motion for a jury trial in his appeal from a clerk's order allowing a foreclosure was proper because, inter alia, N.C. Const., Art. I, § 25 guaranteed the right to a jury trial only for cases where the right existed when the Constitution of 1868 was adopted, and there was no right to a jury in foreclosure proceedings when the Constitution of 1868 was adopted. In re Foreclosure of Real Prop. Under Deed of Trust, — N.C. App. —, 667 S.E.2d 259, 2008 N.C. App. LEXIS 1756 (2008).

**Attorney Disciplinary Proceedings.** — This State has never had a statute which expressly conferred upon an attorney the right to a trial by jury in a judicial disciplinary or disbarment proceeding. Since no such right existed at common law, or by statute at the time the State Constitution was adopted, and is not now provided for by statute, an attorney's motion for a trial by jury is properly denied. In re Northwestern Bonding Co., 16 N.C. App. 272, 192 S.E.2d 33, appeal dismissed, 282 N.C. 426, 192 S.E.2d 837 (1972).

The legislature in 1969 had absolutely no intention of providing a constitutional right to jury trial for attorneys in disciplinary proceedings when it submitted this section to the people. North Carolina State Bar v. DuMont, 304 N.C. 627, 286 S.E.2d 89 (1982).

**No Right to Jury Trial In Action to Determine Attorneys' Fees Under Quantum Meruit.** — Trial court did not err in denying a law firm's request for a jury trial on the reasonable value of the attorneys who had provided legal services for a client under a contingency fee agreement and who were then discharged by the client under N.C. Const. art. I, § 25 and N.C. Const. art. IV, § 13; until adoption of the modern rule, clients had no right to unilaterally discharge an attorney and force him to pursue a quantum meruit claim, and the right to a jury trial under N.C. Const. art. I, § 25 was guaranteed only in cases in which the right and the remedy were in existence when the North Carolina Constitution of 1868 was adopted. Guess v. Parrott, 160 N.C. App. 325, 585 S.E.2d 464, 2003 N.C. App. LEXIS 1798 (2003).

**Shareholder's Derivative Actions.** — Although a litigant's right to have a jury try issues of fact concerning the merits of the action initiated by the filing of a derivative suit complaint is guaranteed by the Constitution of

North Carolina, the procedure required by former G.S. 55-55(c) did not exist before the adoption of the Constitution of 1868, and therefore no State constitutional right exists to a trial by jury of factual issues that might arise during the course of the proceedings required under this section. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

**No Right to Jury Trial Under Coastal Area Management Act.** — In an action brought by State seeking preliminary injunction to require removal of sign and compliance with Coastal Area Management Act (CAMA), sign company was not entitled to trial by jury since it had not asserted "right and remedy" existing when State Constitution was adopted and since CAMA did not provide statutory right to jury trial. State ex rel. Rhodes v. Givens, 101 N.C. App. 695, 400 S.E.2d 745 (1991).

**Proceedings before the judge to remove a prosecuting attorney from office** for willful misconduct or maladministration in office do not require an issue to be submitted to the jury, as such office is not a property right under the provisions of this section. State ex rel. Hyatt v. Hamme, 180 N.C. 684, 104 S.E. 174 (1920).

**Revocation of Driver's License.** — Since an action to revoke a driver's license is a civil action, jury trial is not necessary. State v. Carlisle, 20 N.C. App. 358, 201 S.E.2d 704 (1973), aff'd, 285 N.C. 229, 204 S.E.2d 15 (1974).

**Section 18B-504 does not preserve the right to trial by jury.** State v. Morris, 103 N.C. App. 246, 405 S.E.2d 351 (1991).

**Neither § 90-112 nor § 90-112.1 creates a right to trial by jury.** State v. Morris, 103 N.C. App. 246, 405 S.E.2d 351 (1991).

**An action under § 90-112.1** is in the nature of an action for replevin and is in essence a civil action; as such, the right to a jury trial, if any, is governed by this section of the Constitution, and thus, defendant was not entitled to a trial by jury for her remission action. State v. Honaker, 111 N.C. App. 216, 431 S.E.2d 869 (1993).

**Insanity Proceedings.** — The right to trial by jury did not exist at common law in insanity proceedings and is thus not required under this section. In re Taylor, 25 N.C. App. 642, 215 S.E.2d 789 (1975).

**Taxes.** — The right to trial by jury guaranteed by this section does not apply to matters concerned with the administration of the tax laws and the machinery for the collection of taxes, unless the statute affords express authority for this method of determining questions of fact. State ex rel. Unemployment Comp. Comm'n v. J.M. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941).

This section does not require court review of the valuation of land for taxation, or determination of such value by a jury in a de novo hearing, and will not support resort to certiorari for that purpose. Belk's Dep't Store, Inc. v. Guilford County, 222 N.C. 441, 23 S.E.2d 897 (1943).

**As to controversies between Board of Education and county commissioners,** see Board of Educ. v. Board of Comm'rs, 182 N.C. 571, 109 S.E. 630 (1921), citing Board of Educ. v. Board of County Comm'rs, 174 N.C. 469, 93 S.E. 1001 (1917).

## Sec. 26. Jury service.

No person shall be excluded from jury service on account of sex, race, color, religion, or national origin.

**History.** — The provisions of this section are similar to those of the second sentence of Art. I, § 19, Const. 1868, as amended in 1946.

**Legal Periodicals.** — For article, "Race-Based Peremptories No Longer Permitted in Civil Trials: Jackson v. Housing Authority of High Point," see 67 N.C.L. Rev. 1262 (1989).

### CASE NOTES

**Intent of Section.** — This section is intended to protect the integrity of the judicial system, not just the reliability of the conviction obtained in a particular case. State v. Cofield, 320 N.C. 297, 357 S.E.2d 622 (1987).

This section does more than protect individuals from unequal treatment; the people of this State have declared in this provision that they will not tolerate the corruption of their juries by racism, sexism, and similar forms of irrational prejudice. State v. Cofield, 320 N.C. 297, 357 S.E.2d 622 (1987).

**The right to trial by jury carries with it** the right to be tried before a body selected in such a manner that competing and divergent interests and perspectives in the community are reflected rather than reproduced absolutely. State v. Bowman, 349 N.C. 459, 509 S.E.2d 428 (1998), cert. denied, 527 U.S. 1040, 119 S. Ct. 2403, 144 L. Ed. 2d 802 (1999).

**Statistics of Underrepresentation.** — Statistics concerning one jury pool, standing alone, are insufficient to show that underrepresentation of the defendant's race is due to systematic exclusion of the group in the jury selection process. State v. Bowman, 349 N.C. 459, 509 S.E.2d 428 (1998), cert. denied, 527 U.S. 1040, 119 S. Ct. 2403, 144 L. Ed. 2d 802 (1999).

A jury venire of only 8.3% African-Americans, where the census for the county revealed that African-Americans comprised 16.15% of the county's population, did not encroach on the defendant's constitutional right to be tried by a jury of his or her peers, where he did not allege systematic exclusion, only that the court should have taken affirmative steps to ensure that the jury venire called for his trial was racially proportionate; a 7.85% difference, standing alone, did not render the jury venire constitutionally infirm. State v. Blakeney, 352 N.C. 287, 531 S.E.2d 799, 2000 N.C. LEXIS 528 (2000), cert. denied, 531 U.S. 1117, 121 S. Ct. 868, 148 L. Ed. 2d 780 (2001).

**Prima Facie Showing of Intentional Discrimination.** — As with race-based "Batson" claims, a party alleging gender discrimination must make a prima facie showing of intentional discrimination before the party exercising the preemptory challenge of a juror is required to explain the basis for the strike. State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997), cert. denied, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997).

Case was remanded for a Batson hearing after the trial court erred by concluding that the defendant failed to present a prima facie showing during voir dire to challenge the prosecutor's peremptory strikes of prospective minority jurors, as a numerical analysis of the prosecutor's peremptory strikes, while not conclusive of the issue, called into question the prosecutor's conduct. State v. Barden, 356 N.C. 316, 572 S.E.2d 108, 2002 N.C. LEXIS 1115 (2002).

**To make out a prima facie case of discrimination.** a defendant need only show that the relevant circumstances raise an inference that the prosecutor used peremptory challenges to remove potential jurors solely because of their race. State v. Quick, 341 N.C. 141, 462 S.E.2d 186 (1995).

The trial court properly denied defendant's Batson challenge based on defendant's failure to make a prima facie showing of racial discrimination; a prima facie case was not made out simply because the juror struck by the peremptory challenge and the defendant were both African-Americans. State v. Lawrence, 352 N.C. 1, 530 S.E.2d 807, 2000 N.C. LEXIS 441 (2000).

**Showing of Disproportionate Racial Representation.** — To establish a prima facie case of disproportionate representation of a defendant's race in a jury venire, a defendant must show: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the group representation in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under representation is due to systematic exclusion of the group in the jury-selection process. State v. Bowman, 349 N.C. 459, 509 S.E.2d 428 (1998), cert. denied, 527 U.S. 1040, 119 S. Ct. 2403, 144 L. Ed. 2d 802 (1999).

**Evidence to Show Pretextual Nature of Prosecutor's Explanation.** — In North Carolina in a claim of racially discriminatory use of peremptory challenges, the defendant may put on additional evidence before the trial court's final ruling to prove that the prosecutor's explanations are pretextual. State v. Williams, 339 N.C. 1, 452 S.E.2d 245 (1994), cert. denied, 516 U.S. 833, 116 S. Ct. 109, 133 L. Ed. 2d 61 (1995), overruled in part, State v. Warren, 347 N.C. 309, 492 S.E.2d 609 (1997).

**Disparate Treatment of Prospective Jurors Not Dispositive.** — Although the prosecutor claimed to have struck one of the black jurors because of her family's involvement with crime, another because of inconsistent statements and a third because of the juror's views on the death penalty, but, according to defendant, the prosecutor passed two white jurors with criminal backgrounds, one white juror who made inconsistent statements and another who expressed reservations about imposing the death penalty, disparate treatment of prospective jurors was not necessarily dispositive on the issue of discriminatory intent. State v. Williams, 339 N.C. 1, 452 S.E.2d 245 (1994), cert. denied, 516 U.S. 833, 116 S. Ct. 109, 133 L. Ed. 2d 61 (1995), overruled in part, State v. Warren, 347 N.C. 309, 492 S.E.2d 609 (1997).

**An excusal, under § 9-3, based on a juror's inability to understand the English language,** is not a violation of the provision of Article 1, G.S. 26 of the North Carolina Constitution that none shall be excluded from jury service on account of national origin. State v. Smith, 352 N.C. 531, 532 S.E.2d 773, 2000 N.C. LEXIS 617 (2000), cert. denied, 532 U.S. 949, 121 S. Ct. 1419, 149 L. Ed. 2d 360 (2001).

**Excuse Based on Age.** — Statutory scheme allowing trial judge to exercise his discretion to excuse jurors over the age of 65 has a rational basis and is not constitutionally infirm. State v. Rogers, 355 N.C. 420, 562 S.E.2d 859, 2002 N.C. LEXIS 429 (2002).

**The spirit of this section requires that all grand jurors be considered for appointment as grand jury foreman.** State v. Cofield, 324 N.C. 452, 379 S.E.2d 834 (1989).

**Selection of Grand Jury Foreman Must Meet Racially Neutral Standard.** — A method of selecting a grand jury foreman that meets the racially neutral standard must ensure that all grand jurors are considered by the presiding judge for his selection and that his selection be made on a racially neutral basis. State v. Cofield, 324 N.C. 452, 379 S.E.2d 834 (1989), holding, however, that this holding applies only to the case at hand and cases in which the indicting grand jury's foreman is selected after the certification date of the opinion of the case at hand.

**Racial discrimination in the selection of a grand jury foreman** from a panel of grand jurors selected in a nondiscriminatory manner violates this section and N.C. Const., Art. I, § 19. State v. Cofield, 320 N.C. 297, 357 S.E.2d 622 (1987).

A black defendant may make out a prima facie case of racial discrimination in the grand jury foreman's selection by showing either (1) that the selection procedure itself was not racially neutral, or (2) that for a substantial period in the past, relatively few blacks have served in the position of foreman even though a substantial number have been selected to serve as members of grand juries. The State may rebut such a prima facie case on remand by offering evidence that the process used in selecting the grand jury foreman was in fact racially neutral. State v. Cofield, 320 N.C. 297, 357 S.E.2d 622 (1987).

**To Establish Prima Facie Case of Racial Discrimination in Selection of Grand Jury Foreman.** — A black defendant may make out a prima facie case of racial discrimination in the grand jury foreman's selection by showing either (1) that the selection procedure itself was not racially neutral, or (2) that for a substantial period in the past, relatively few blacks have served in the position of foreman even though a substantial number have been selected to serve as members of grand juries. The State may rebut such a prima facie case on remand by offering evidence that the process used in selecting the grand jury foreman was in fact racially neutral. State v. Cofield, 320 N.C. 297, 357 S.E.2d 622 (1987).

**Circumstances Collectively Showed Discrimination.** — After a black woman was seated for examination during voir dire, the prosecutor asked the clerk if there was a white male out there; the prosecutor briefly questioned the woman and then peremptorily challenged her; the woman was excused and a white man was called for examination and later became the jury foreperson. Standing alone, the prosecutor's peremptory challenge of the black woman would not amount to a prima facie showing of purposeful discrimination. The prosecutor's question of the clerk prior to his examination of the black woman, however, is a relevant circumstance which, when combined with the prosecutor's subsequent peremptory challenge of the black woman, raises an inference of purposeful discrimination on the prosecutor's part thereby establishing a prima facie showing. State v. Hall, 104 N.C. App. 375, 410 S.E.2d 76 (1991).

**Peremptory Challenge Test Based on Race Same as Federal Test.** — The test to determine whether peremptory challenges were exercised in a racially discriminatory manner is the same under the North Carolina Constitution as it is under the United States Constitution. State v. Floyd, 343 N.C. 101, 468 S.E.2d 46 (1996), cert. denied, 519 U.S. 896, 117 S. Ct. 241, 136 L. Ed. 2d 170 (1996).

**Racial Neutrality of Peremptory Strike.** — Whether an explanation for a peremptory strike of a prospective juror being challenged as racially discriminatory is indeed neutral depends on whether, accepting the proffered reason as true, the challenge constitutes purposeful discrimination as a matter of law. State v. White, 131 N.C. App. 734, 509 S.E.2d 462 (1998).

A peremptory strike of a prospective juror was without racially discriminatory intent where the prosecutor stated that it was based on the prospective juror's limited education, his limited ability to read and write, his failure to answer all questions on the juror questionnaire, his statement that he had never considered his views on the death penalty until that day, and the prosecutor's impression that the juror may be "out of touch with reality." State v. Hardy, 353 N.C. 122, 540 S.E.2d 334, 2000 N.C. LEXIS 902 (2000), cert. denied, 534 U.S. 840, 122 S. Ct. 96, 151 L. Ed. 2d 56 (2001).

**Peremptory Challenges Based on Race Proscribed.** — This section proscribes peremptory challenges to jurors in civil cases as well as criminal cases on the basis of race. Jackson v. Housing Auth., 321 N.C. 584, 364 S.E.2d 416 (1988).

**The State's explanation for using a peremptory strike,** in response to a challenge that it was racially motivated, must be clear, reasonably specific, and related to the particular case to be tried, although it need not rise to the level justifying exercise of a challenge for cause. State v. White, 131 N.C. App. 734, 509 S.E.2d 462 (1998).

**Race or Religion of Defendant Different from Excluded Juror.** — Discrimination in selecting juries so strongly taints the judicial system that any proceeding in which it appears is fatally flawed; for this reason, the fact that the defendant's race or religion differs from the excluded person's is irrelevant. State v. Eason, 336 N.C. 730, 445 S.E.2d 917 (1994), cert. denied, 513 U.S. 1096, 115 S. Ct. 764, 130 L. Ed. 2d 661 (1995).

**Challenge Not Pretextual.** — Defendant's proffered reasons for challenging a black juror were not pretextual where the juror had been convicted on six occasions of issuing worthless checks and was not forthright about her convictions upon questioning. State v. Peterson, 344 N.C. 172, 472 S.E.2d 730 (1996).

**Peremptory Challenges Upheld.** — In a capital case, peremptory challenges to 5 of 6 potential black jurors were upheld where the State met its burden of coming forward with neutral, nonracial explanations for each peremptory challenge. State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991).

No purposeful racial discrimination occurred in the peremptory challenges of black jurors where trial court's ruling was supported by the trial court's findings of fact, which were supported by the record. State v. Thomas, 329 N.C. 423, 407 S.E.2d 141 (1991), cert. denied, 522 U.S. 824, 118 S. Ct. 84, 139 L. Ed. 2d 41 (1997).

The State did not discriminate on the basis of race in exercising its peremptory challenges against two jurors, where the State provided race-neutral reasons for the peremptory challenges of both jurors, namely that one was young, within the age range of defendants, and had a sister who was also within the age range of defendants, and that the other had been convicted of driving while impaired and had a father with a prior conviction for robbery for which he had served six years, and where, in selecting the 12 jurors and four alternates, the State exercised 27 peremptory challenges, only four of which were against African-Americans. This ratio represented a percentage of African-Americans equivalent to the percentage of African-Americans in the jury pool. Moreover, during jury selection, the State made no comments which would support an inference of discrimination. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

Murder defendant failed to show that jurors were improperly excluded on the basis of race, given one juror's opposition to the death penalty, another juror's potential sympathy for defendant, and a third juror's employment counseling inmates. State v. Fair, 354 N.C. 131, 552 S.E.2d 568, 2001 N.C. LEXIS 944 (2001).

Defendant's Batson challenge to the jury, under principles of racial discrimination, gender discrimination, and racial-gender discrimination combined, were carefully evaluated under the various prongs of Batson and found not to have violated U.S. Const., Amend. VI and N.C. Const., Art. I, § 26, where the trial court found that defendant established a prima facie case that the peremptory challenges were exercised on the basis of race, but thereafter, the prosecutor's reasons were found to be racially neutral; the court found no purposeful discrimination in the challenges made by the prosecutor, and challenges to the other forms of discriminatory challenge lacked merit because there was insufficient proof that a cognizable group had been singled out for exclusion. State v. Wiggins, 159 N.C. App. 252, 584 S.E.2d 303, 2003 N.C. App. LEXIS 1502 (2003), cert. denied, 541 U.S. 910, 124 S. Ct. 1617, 158 L. Ed. 2d 256 (2004).

State's preemptory challenges, which did not violate Batson because they were race-neutral, were based on potential juror's (1) strong and absolute opposition to death penalty, (2) concern for undue sympathy for the defendant, (3) pregnancy making it difficult to take a life when carrying a life, (4) prison ministry dealing with violent criminals to reform them, (5) rheumatoid arthritis, (6) nervousness about thought of having to impose death penalty, and (7) being homemaker with child with special needs and her sympathies. State v. Bell, 359 N.C. 1, 603 S.E.2d 93, 2004 N.C. LEXIS 1126 (2004).

Trial court did nor err in denying defendant's Batson challenge to the State's exercising of a peremptory challenge to remove a prospective African-American juror because the State's race neutral explanations for using a peremptory challenge to remove a prospective African-American juror — that her responses on death penalty were weak, that she admitted she might develop sympathy toward defendant, and that she made a misrepresentation on her questionnaire — complied with Batson. State v. Alvarez, 168 N.C. App. 487, 608 S.E.2d 371, 2005 N.C. App. LEXIS 342 (2005).

Defendant failed to make a prima facie showing of racial discrimination with regard to the State's preemptory challenge of a prospective juror which was granted in defendant's trial for first-degree murder and the trial court, therefore, did not err in overruling defendant's Batson objection because, despite the juror being the first African American to have been challenged, other factors supported the trial court's ruling such as the fact that the victim and the State's three critical witnesses were all African American. Therefore, the case was not particularly susceptible to racial discrimination and the State neither made any racially motivated statements nor asked any racially motivated questions of the prospective juror. State v. Augustine, 359 N.C. 709, 616 S.E.2d 515, 2005 N.C. LEXIS 836 (2005).

State's peremptory challenges to three African-American prospective jurors did not establish a pattern of discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and N.C. Const., Art. I, § 26, when viewed in conjunction with other relevant facts. When defendant made his Batson objection, the State had accepted two out of five, or forty percent, of eligible African-American jurors; and the State's statements and questions during voir dire appeared evenhanded and not racially motivated. State v. Taylor, 362 N.C. 514, 669

S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

In an appeal as of right with regard to the imposition of a sentence of death against a defendant following a jury trial, which resulted in his conviction for the first-degree murder of a police officer while in the performance of his duties, the defendant's claim of gender bias in the State's peremptory challenge of a prospective juror was not an exceptional circumstance calling for invocation since the defendant had not objected to any of the State's peremptory challenges on the ground of discrimination against women. State v. Maness, 363 N.C. 261, 677 S.E.2d 796, 2009 N.C. LEXIS 621 (June 18, 2009).

**The defendant did not make a prima facie showing of racially motivated peremptory challenges** where the State accepted seven of the 17 black veniremen tendered and the majority of the jury which tried the defendant was black. State v. Allen, 323 N.C. 208, 372 S.E.2d 855 (1988), sentence vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990), in light of 281 U.S. 700, 50 S. Ct. 353, 74 L. Ed. 1126 (1930), rehearing denied.

Defendant, found guilty of murder and robbery, failed to establish a prima facie case of racial discrimination in the State's use of its peremptory challenges, where the State's questions during voir dire focused on the prospective juror's feelings about capital punishment and the age of the juror, or his or her children, as compared with defendant's age; the venire persons were brought into the courtroom individually, so neither defendant nor the State knew how many black citizens were present in the venire or whether a black citizen would be examined next; and three of the first four jurors seated were black, as were both defendant and the victim, thus diminishing the likelihood that racial issues were inextricably bound up with the conduct of the trial. State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989), cert. denied, 496 U.S. 905, 110 S. Ct. 2587, 110 L. Ed. 2d 268 (1990).

Defendant failed to establish a prima facie case of purposeful discrimination in selection of the jury where the jury consisted of ten white jurors and two black jurors, the only peremptory challenge exercised by the prosecutor excused a black man from the jury, but the prosecutor also accepted the two women who were the other black members of the jury venire, he accepted one at the same time he challenged the black male juror, indicating that he was not attempting to strike all blacks, and he did not move to strike any jurors for cause, thus, accepting 66% of the black potential jurors. State v. Ross, 338 N.C. 280, 449 S.E.2d 556 (1994).

The prosecutor's peremptory excusal of two of four black jurors in a case involving sexual offenses against a white woman by a black man was not sufficient, standing alone, to establish a prima facie case of racial discrimination and require the prosecutor to come forward with race-neutral explanations. State v. Quick, 341 N.C. 141, 462 S.E.2d 186 (1995).

The prosecutor gave race neutral reasons for his peremptory strikes of black jurors in a capital murder case, where one was excused for his criminal record, body language, and lack of candor, and another because she was confused, she did not think that wife-beating was a serious crime, and she had a relative in jail. State v. White, 131 N.C. App. 734, 509 S.E.2d 462 (1998).

Even though the prosecutor's reasons for peremptory strikes of two black females were suspect, in that he initially identified them as two "black" females, the defense failed to object, and the stated reasons that the prospects were health care providers and close to defendant's age were adequate to support the strikes. State v. White, 131 N.C. App. 734, 509 S.E.2d 462 (1998).

Defendant failed to establish a prima facie case that the State exercised its peremptory challenges in a racially discriminatory manner during the jury selection process where the victims were black, the State's key witnesses were black, the prosecutor made no racially motivated remarks, and the jury was composed of four black males, one black female, three white males, and four white females, with one black male and one black female as alternates. State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (2000), cert. denied, 531 U.S. 862, 121 S. Ct. 151, 148 L. Ed. 2d 100 (2000).

Defendants did not meet their burden of showing purposeful discrimination in the selection of jurors, due to the racially diverse composition of the jury and the trial court's finding that the prosecution's explanations for striking of prospective jurors because of conduct were not pretextual. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

Under U.S. Const., Amend. XIV, as well as N.C. Const., Art. I, § 26, the State used a peremptory challenge to excuse an African-American prospective juror, however, the State offered race neutral reasons for the excusal, even though other potential jurors may have given similar answers, that she (1) was against killing whether it was legal or illegally and that her opposition was based on religious, moral, and philosophical beliefs she had held since childhood, and (2) had a brother who had previously been convicted of armed robbery; the trial judge was in the best position to resolve this issue, having heard and seen the responses of the prospective juror, including her facial expressions, tone of voice, reactions, and other nuances that were not subject to translation when the appeals court reviewed the cold record on appeal. State v. McClain, 169 N.C. App. 657, 610 S.E.2d 783, 2005 N.C. App. LEXIS 804 (2005).

**Findings as to race neutrality and purposeful discrimination were supported by the record** and the trial court properly overruled defendants' objections to the excusal of six prospective jurors. State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997), cert. denied, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997).

**The trial court applied the correct criteria** when it approved a jury panel of eight black jurors and four white jurors with three alternates selected, one of whom was black and two of whom were white, and heard arguments regarding the prosecutor's reverse-Batson challenge and defendant's Batson challenge. State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

**Opposition to Capital Punishment on Religious Grounds.** — Where the record established beyond a doubt that juror was excused, not because of his choice of religion, but because of his inability to follow the law regarding his duties as a juror, the fact that the prospective juror's religion provided the basis for his views in opposition to the death penalty did not alter the propriety of excluding him for cause. State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989); 496 U.S. 905, 110 S. Ct. 2587, 110 L. Ed. 2d 268 (1990); State v. Warren, 348 N.C. 80, 499 S.E.2d 431 (1998).

Where potential juror, who was a Jehovah's Witness, was stricken because of reservation about the death penalty and another prospective juror stated that he had no reservations which might impair his serving on the jury, and he was chosen to sit, there was sufficient support for the conclusion that potential juror removed from the jury because of her reservations about the death penalty, not because of her religious affiliation. State v. Eason, 336 N.C. 730, 445 S.E.2d 917 (1994), cert. denied, 513 U.S. 1096, 115 S. Ct. 764, 130 L. Ed. 2d 661 (1995).

**Violation of Defendant's Rights Was Not Shown.** — Where, although the State did not outline a profile or criteria for selecting jurors, it was obvious from the record that it would strike jurors who had connections to the defendants or to a principal State's witness or whom it believed would be prejudicial against the State, the record did not reflect that the assistant district attorney made any comments indicating a purpose to discriminate, and there was no transcript of the jury's voir dire and there was incomplete information on the racial composition of the jury venire and the jury, the defendants did not show that the trial judge violated defendant's rights under either the federal or State constitutions by overruling their objections to the State's use of peremptory challenges. State v. Cannon, 92 N.C. App. 246, 374 S.E.2d 604 (1988), rev'd on other grounds, 326 N.C. 37, 387 S.E.2d 450 (1989).

Defendant was not denied a fair trial where the percentage of African-American jurors in the jury pool at his trial was 8.67 percent and the percentage of African-American jurors in the county was 20.8 percent; defendant presented no evidence showing that the alleged deficiency of African-Americans on the jury was because of the systematic exclusion of this group in the jury-selection process, and the prosecutor provided race neutral explanations for the peremptory challenges of two prospective African-American jurors.

**Appellate Review of Findings as to Intentional Racial Discrimination.** — An appellate court will uphold the trial court's findings regarding intentional racial discrimination in jury selection unless the reviewing court is left with the definite and firm conviction that a mistake has been committed, based on the entire evidence. State v. White, 131 N.C. App. 734, 509 S.E.2d 462 (1998).

**Adequacy of Record.** — Defendant's Batson challenge, which alleged discrimination in the exercise of peremptory challenges in violation of N.C. Const., Art. I, § 26, was denied, because the record did not reconstruct jury selection in sufficient detail to enable the appellate court to conduct appellate review of the trial court's determination that defendant failed to make a prima facie showing of race and gender discrimination in the prosecutor's exercise of peremptory challenges. State v. Shelman, 159 N.C. App. 300, 584 S.E.2d 88, cert. denied sub nom. State v. Shelman, 357 N.C. 581, 589 S.E.2d 363 (2003).

**Applied** in State v. Wiggins, 334 N.C. 18, 431 S.E.2d 755 (1993).

**Cited** in State v. Miller, 339 N.C. 663, 455 S.E.2d 137; State v. Crandell, 322 N.C. 487, 369 S.E.2d 579 (1988); State v. Agudelo, 89 N.C. App. 640, 366 S.E.2d 921 (1988); State v. Payne, 327 N.C. 194, 394 S.E.2d 158 (1990); State v. Smith, 328 N.C. 99, 400 S.E.2d 712 (1991); State v. Glenn, 333 N.C. 296, 425 S.E.2d 688 (1993); In re Browning, 124 N.C. App. 190, 476 S.E.2d 465 (1996); State v. Robinson, 346 N.C. 586, 488 S.E.2d 174, 1997 N.C. LEXIS 478 (1997); State v. Cummings, 346 N.C. 291, 488 S.E.2d 550 (1997); State v. Caporasso, 128 N.C. App. 236, 495 S.E.2d 157 (1998); State v. White, 349 N.C. 535, 508 S.E.2d 253 (1998); State v. Bonnett, 348 N.C. 417, 502 S.E.2d 563 (1998); State v. King, 353 N.C. 457, 546 S.E.2d 570, 2001 N.C. LEXIS 527 (2001); State v. Rouse, — N.C. App. —, 679 S.E.2d 520, 2009 N.C. App. LEXIS 1162 (July 21, 2009).

## Sec. 27. Bail, fines, and punishments.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

**Cross References.** — For general provisions as to bail, see G.S. 15A-531 et seq.

**History.** — The provisions of this section are similar to those of Art. I, § 14, Const. 1868.

**Legal Periodicals.** — For article on punishment for crime in North Carolina, see 17 N.C.L. Rev. 205 (1939).

For case law survey as to cruel and unusual punishment, see 44 N.C.L. Rev. 936 (1966); 45 N.C.L. Rev. 864 (1967).

For note on appellate review of legal but excessive sentences, see 44 N.C.L. Rev. 1118 (1966).

For comment on bail in North Carolina, see 5 Wake Forest Intra. L. Rev. 300 (1969).

For article surveying recent decisions by the North Carolina Supreme Court in the area of criminal procedure, see 49 N.C.L. Rev. 262 (1971).

For article, "Sentencing Due Process: Evolving Constitutional Principles," see 18 Wake Forest L. Rev. 523 (1982).

### CASE NOTES

I. In General.
II. Particular Statutes.
III. Illustrative Cases.

### I. IN GENERAL.

*Editor's Note. — Some of the cases cited below were decided under former Art. I, § 14, Const. 1868.*

**Punishment Is Within Province of Legislature.** — It is within the province of the General Assembly and not the judiciary to determine the extent of punishment which may be imposed on those convicted of crime. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972). See also, State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410, rev'd, 403 U.S. 948, 91 S. Ct. 2292, 29 L. Ed. 2d 861 (1971); State v. Cross, 27 N.C. App. 335, 219 S.E.2d 274 (1975); State v. Legette, 292 N.C. 44, 231 S.E.2d 896 (1977); State v. Jenkins, 292 N.C. 179, 232 S.E.2d 648 (1977).

**This section restricts the judiciary from imposing excessive punishments** where the legislature has not prescribed a fixed maximum, and does not apply to the legislative power to impose the penalty for acts made an offense by them. State v. Blake, 157 N.C. 608, 72 S.E. 1080 (1911).

**But May Affect Legislative Enactments in Exceptional Cases.** — This section is an admonition to the judiciary in imposing sentence left to an extent within its discretion by the statutes; however, there is a decided intimation that in extraordinary and exceptional cases it may be held to affect legislative enactments as well. State v. Smith, 174 N.C. 804, 93 S.E. 910 (1917).

**Discretion of Court in Sentencing.** — Within the limits of the sentence permitted by the law, the character and extent of the punishment is committed to the sound discretion of the trial court, and may be reviewed only in case of manifest and gross abuse. State v. McKinney, 4 N.C. App. 107, 165 S.E.2d 689 (1969).

Punishment ought to be left to the judge who inflicts it under the circumstances of each case, and ought not to be interfered with, except when the abuse is palpable. State v. Driver, 78 N.C. 423 (1878); State v. Reid, 106 N.C. 714, 11 S.E. 315 (1890).

Where the question of punishment is left to the sound discretion of the court, the court is limited only by the prohibition against cruel or unusual punishment in this section. State v. Richardson, 221 N.C. 209, 19 S.E.2d 863 (1942).

**What constitutes cruel and unusual punishment is a question of law** for the court and is not subject to proof by expert opinion evidence. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969), cert. denied, 396 U.S. 1024, 90 S. Ct. 599, 24 L. Ed. 2d 518 (1970).

**Test as to Reasonableness of Punishment.** — There are two things which have been looked upon as very good guides in determining the reasonableness of punishment: (1) what has formerly been expressly done in like cases, and (2) for the want of such particular discretion then to consider that which comes nearest to it. State v. Driver, 78 N.C. 423 (1878).

**Punishment Within Limits Fixed by Statute Cannot Be Held Cruel or Unusual.** — A punishment which is within the limits authorized by statute cannot be held cruel or unusual in the constitutional sense. State v. Stansbury, 230 N.C. 589, 55 S.E.2d 185 (1949); State v. Welch, 232 N.C. 77, 59 S.E.2d 199 (1950); State v. Davis, 267 N.C. 126, 147 S.E.2d

570 (1966); State v. Bruce, 268 N.C. 174, 150 S.E.2d 216 (1966); State v. Carter, 269 N.C. 697, 153 S.E.2d 388 (1967); State v. Greer, 270 N.C. 143, 153 S.E.2d 849 (1967); State v. LePard, 270 N.C. 157, 153 S.E.2d 875 (1967); State v. Hilton, 271 N.C. 456, 156 S.E.2d 833 (1967); State v. Robinson, 271 N.C. 448, 156 S.E.2d 854 (1967); State v. Hopper, 271 N.C. 464, 156 S.E.2d 857 (1967); State v. Lovelace, 271 N.C. 593, 157 S.E.2d 81 (1967); Mathis v. North Carolina, 266 F. Supp. 841 (M.D.N.C. 1967); State v. Mosteller, 3 N.C. App. 67, 164 S.E.2d 27 (1968); State v. McKinney, 4 N.C. App. 107, 165 S.E.2d 689 (1969); State v. Culp, 5 N.C. App. 625, 169 S.E.2d 10 (1969); State v. Powell, 6 N.C. App. 8, 169 S.E.2d 210 (1969); State v. Price, 8 N.C. App. 94, 173 S.E.2d 644 (1970); State v. Blake, 14 N.C. App. 367, 188 S.E.2d 607 (1972); State v. Harris, 27 N.C. App. 385, 219 S.E.2d 306 (1975).

**Unless Punishment Provisions of Statute Itself Are Unconstitutional.** — When punishment does not exceed the limits fixed by statute it cannot be classified as cruel and unusual in a constitutional sense, unless the punishment provisions of the statute itself are unconstitutional. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969), cert. denied, 396 U.S. 1024, 90 S. Ct. 599, 24 L. Ed. 2d 518 (1970); State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410, rev'd, 403 U.S. 948, 91 S. Ct. 2292, 29 L. Ed. 2d 861 (1971); State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972); State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907, appeal dismissed and cert. denied, 304 N.C. 200, 285 S.E.2d 108 (1981).

**The Department of Correction has a duty to provide adequate medical care** to inmates in its custody, and that duty is of such great importance that the state cannot avoid liability by contracting with someone else to perform it. Medley v. North Carolina Dep't of Cor., 330 N.C. 837, 412 S.E.2d 654 (1992).

**Consecutive Sentences.** — Where there was a conviction of the violation of two separate criminal statutes, consolidated and tried as two counts under one bill of indictment, a sentence for each offense, the one to begin upon the expiration of the other term, confining the punishment as to each within that prescribed in the statute relating to it, could not be considered under the facts of the case as cruel and unusual within the inhibition of this section. State v. Malpass, 189 N.C. 349, 127 S.E. 248 (1925).

Sentences within the statutory limits that impose consecutive sentences do not constitute cruel and unusual punishment. State v. Handsome, 300 N.C. 313, 266 S.E.2d 670 (1980).

Imposition of two life sentences to run consecutively does not contravene the constitutional prohibition against cruel and unusual punishment. State v. Mosteller, 3 N.C. App. 67, 164 S.E.2d 27 (1968). See also, State v. Bruce, 268 N.C. 174, 150 S.E.2d 216 (1966).

**Two Year Sentence.** — When no time was fixed by the statute, an imprisonment for two years would not be held cruel and unusual. State v. Driver, 78 N.C. 423 (1878); State v. Miller, 94 N.C. 904 (1886); State v. Farrington, 141 N.C. 844, 53 S.E. 954 (1906); State v. Moschoures, 214 N.C. 321, 199 S.E. 92 (1938); State v. Crandall, 225 N.C. 148, 33 S.E.2d 861 (1945); State v. Lee, 247 N.C. 230, 100 S.E.2d 372 (1957).

**Jury Instructions.** — While trial court's jury instructions may have been confusing initially, the court ultimately set forth the required elements as to felonious assault with a deadly weapon inflicting serious injury and, therefore, did not violate the defendant's constitutional rights under this section and N.C. Const., Art. I, § 19 and 23. State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

Failure to charge jury with exact language requested by defendant did not violate defendant's rights under the Eighth or Fourteenth Amendments or N.C. Const. art. I, §§ 19 or 27, where the trial court used the pattern jury instruction to given in substance those of defendant's requested instructions which were correct in the law. State v. Morgan, 359 N.C. 131, 604 S.E.2d 886, 2004 N.C. LEXIS 1199 (2004).

**Peremptory instruction on nonstatutory mitigating circumstances** which required the jury to find both that the circumstances existed and that the circumstances had mitigating value did not preclude the sentencer from considering relevant mitigating evidence in violation of the Constitution; the Constitution does not require that the sentencing jury "find" each circumstance which the court submits as potentially mitigating, but requires only that the sentencer be permitted to consider any relevant mitigating evidence. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

**Scope of Evidence in Determining Punishment upon Plea of Guilty or Nolo Contendere.** — In making a determination of what punishment should be imposed after a plea of guilty or nolo contendere, a court is not confined to evidence relating to the offense charged. It may look anywhere, within reasonable limits, for other facts calculated to enable it to act wisely in fixing punishment. Hence, it may inquire into such matters as the age, the character, the education, the environment, the habits, the mentality, the propensities, and the record of the person about to be sentenced. In so doing, the court is not bound by the rules of evidence which obtain in a trial where guilt or innocence is put in issue by a plea of not guilty. State v. McKinney, 4 N.C. App. 107, 165 S.E.2d 689 (1969).

**Letter to Parole Commissioner and Instructions to Prosecuting Attorney Not Part of Sentence.** — Defendant's contention that he was subjected to cruel and unusual punishment in that the trial court sentenced him to the maximum prison term permitted by statute for the offense of seduction of which he was convicted, and in addition dictated a letter to the parole commissioner in which he requested that no clemency be extended defendant, and also directed the prosecuting attorney to institute prosecution against defendant for failure to support his illegitimate child, was untenable, since the letter to the parole commissioner and the instructions to the prosecuting attorney were not parts of the sentence. State v. Brackett, 218 N.C. 369, 11 S.E.2d 146 (1940).

**Criminal Trespass.** — Although not expressly limited by statute, the extent of punishment for the crime of criminal trespass was limited by this section, proscribing cruel or unusual punishments, and decisions of the State court indicate that imprisonment for up to two years would not be an "unusual punishment." Klopfer v. North Carolina, 385 U.S. 916, 87 S. Ct. 226, 17 L. Ed. 2d 141 (1966).

**Sterilization.** — The contention that sterilization amounts to cruel and unusual punishment is without basis in law, since the cruel and unusual punishment clause of the Constitution refers to those persons convicted of a crime, and sterilization is not a criminal proceeding within the meaning of this section. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

**Right Not Compromised.** — Defendant was not denied his rights to confrontation, to effective assistance of counsel, to due process, to a jury trial, and to be free from cruel and unusual punishment when the trial court denied defendant's motion for a mistrial based on the alleged misconduct of a juror; the juror inadvertent failure to disclose the 40-year-old information she had forgotten did not amount to concealment, and the juror demonstrated no bias. State v. Maske, 358 N.C. 40, 591 S.E.2d 521, 2004 N.C. LEXIS 18 (2004).

**First-Degree Murder.** — Defendant's right was not violated when the trial court set bond as "no bond" and "zero" because defendant was charged with first-degree murder, a crime for which, under G.S. 15A-533(c), the trial court had the discretion not to set bail. State v. Hocutt, 177 N.C. App. 341, 628 S.E.2d 832, 2006 N.C. App. LEXIS 966 (2006).

**Applied** in Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976); State v. Barrett, 58 N.C. App. 515, 293 S.E.2d 896 (1982); State v. Long, 58 N.C. App. 467, 294 S.E.2d 4 (1982); State v. Ford, 71 N.C. App. 748, 323 S.E.2d 358 (1984); State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994); State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1, 2000 N.C. LEXIS 352 (2000); State v. Duke, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005); State v. Hurst, 360 N.C. 181, 624 S.E.2d 309, 2006 N.C. LEXIS 7 (2006).

**Cited** in In re Reddy, 16 N.C. App. 520, 192 S.E.2d 621 (1972); State v. Foster, 284 N.C. 259, 200 S.E.2d 782 (1973); State v. Woodson, 287 N.C. 578, 215 S.E.2d 607 (1975); Bolding v. Holshouser, 575 F.2d 461 (4th Cir. 1978); State v. Overton, 60 N.C. App. 1, 298 S.E.2d 695 (1982); Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986); State v. Robbins, 319 N.C. App. 465, 356 S.E.2d 279 (1987); State v. Green, 321 N.C. 594, 365 S.E.2d 587 (1988); State v. Degree, 322 N.C. 302, 367 S.E.2d 679 (1988); State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989); Hawkins v. Hawkins, 101 N.C. App. 529, 400 S.E.2d 472 (1991); State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991); State v. O'Neal, 108 N.C. App. 661, 424 S.E.2d 680 (1993); State v. Jennings, 333 N.C. 579, 430 S.E.2d 188 (1993); State v. Fisher, 336 N.C. 684, 445 S.E.2d 866 (1994); State v. Williams, 339 N.C. 1, 452 S.E.2d 245 (1994); State v. Robinson, 342 N.C. 74, 463 S.E.2d 218 (1995); State v. Best, 342 N.C. 502, 467 S.E.2d 45 (1996); State v. Bond, 345 N.C. 1, 478 S.E.2d 163 (1996); State v. Cummings, 346 N.C. 291, 488 S.E.2d 550 (1997); State v. Bonnett, 348 N.C. 417, 502 S.E.2d 563 (1998); State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998); State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999); State v. Peterson, 350 N.C. 518, 516 S.E.2d 131, 1999 N.C. App. LEXIS 419 (1999); State v. McNeil, 350 N.C. 657, 518 S.E.2d 486, 1999 N.C. LEXIS 880 (1999); State v. Cheek, 351 N.C. 48, 520 S.E.2d 545, 1999 N.C. App. LEXIS 1158 (1999); State v. Greene, 351 N.C. 562, 528 S.E.2d 575, 2000 N.C. LEXIS 355 (2000); State v. Holman, 353 N.C. 174, 540 S.E.2d 18, 2000 N.C. LEXIS 909 (2000); In re Allison, 143 N.C. App. 586, 547 S.E.2d 169, 2001 N.C. App. LEXIS 329 (2001); Pittman v. N.C. Dep't of Health & Human Servs., 155 N.C. App. 268, 573 S.E.2d 628, 2002 N.C. App. LEXIS 1579 (2002); State v. Boggess, 358 N.C. 676, 600 S.E.2d 453, 2004 N.C. LEXIS 912 (2004); State v. Cortes-Serrano, — N.C. App. —, 673 S.E.2d 756, 2009 N.C. App. LEXIS 259 (2009).

## II. PARTICULAR STATUTES.

**Armed Robbery.** — The punishment provisions concerning armed robbery are constitutionally valid. State v. Legette, 292 N.C. 44, 231 S.E.2d 896 (1977).

**Death Penalty.** — The State Supreme Court reaffirmed its position that the death penalty statute does not violate the Eighth and Fourteenth Amendments to the United States Constitution and N.C. Const., Art. I, § 19 and this section. State v. McHone, 334 N.C. 627, 435 S.E.2d 296 (1993), cert. denied, 511 U.S. 1046, 114 S. Ct. 1577, 128 L. Ed. 2d 220 (1994).

**Sections 14-190.1, 14-190.13, 14-190.16 and 14-190.17** are constitutional as drawn; while potentially beyond constitutional bounds if improperly applied, these sections are not so substantially overbroad as to require constitutional invalidation on their face. Cinema I Video, Inc. v. Thornburg, 320 N.C. 485, 358 S.E.2d 383 (1987).

**Prohibition.** — Sentence prescribed by statute for violation of prohibition law was held not to be cruel or unusual within the meaning of this section. State v. Daniels, 197 N.C. 285, 148 S.E. 244 (1929).

**Although consent is not a defense to "statutory" rape under § 14-27.7A,** the sentencing scheme does not violate the North Carolina Constitution. State v. Anthony, 133 N.C. App. 573, 516 S.E.2d 195, 1999 N.C. App. LEXIS 604 (1999), appeal dismissed, cert. granted, 351 N.C. 109, 516 S.E.2d 195 (1999), aff'd, 528 S.E.2d 321 (2000).

**Habitual Felon Act.** — Defendant's constitutional challenges to his sentence as an habitual felon failed because (1) the North Carolina Habitual Felon Act was not violative of the Separation of Powers Clause; (2) there was no double jeopardy infirmity inherent in the Habitual Felon Act as applied in conjunction with the North Carolina Structured Sentencing Act; and (3) the state appellate court and the state supreme court have rejected constitutional challenges to the Habitual Felon Act based on allegations of cruel and unusual punishment. State v. McIlwaine, 169 N.C. App. 397, 610 S.E.2d 399, 2005 N.C. App. LEXIS 607 (2005).

## III. ILLUSTRATIVE CASES.

**Armed Robbery.** — A sentence of 24 to 30 years for the offense of robbery with firearms did not exceed the maximum prescribed by statute and did not constitute cruel and unusual punishment. State v. LePard, 270 N.C. 157, 153 S.E.2d 875 (1967).

**Breaking and Entering, etc.** — Three sentences of 47 months each, to run concurrently, imposed on defendant's plea of nolo contendere to three felony counts charging felonious breaking and entering, larceny, and larceny of an automobile, being well within the statutory limits, could not be considered cruel and unusual punishment. State v. Carter, 269 N.C. 697, 153 S.E.2d 388 (1967).

A sentence of 25 years' imprisonment, imposed after a plea of guilty to 4 indictments charging felonious breaking and entering and larceny, did not exceed the statutory maximum and was not cruel and unusual punishment in the constitutional sense. State v. Greer, 270 N.C. 143, 153 S.E.2d 849 (1967).

Imposition of a sentence of imprisonment of 7 to 9 years upon plea of nolo contendere to the offenses of breaking and entering and larceny was not cruel or unusual punishment in a constitutional sense. State v. Robinson, 271 N.C. 448, 156 S.E.2d 854 (1967).

**Concealed Weapons.** — Punishment of 30 days confinement in jail for carrying concealed weapons would be upheld. State v. Woodlief, 172 N.C. 885, 90 S.E. 137 (1916). See also, State v. Mangum, 187 N.C. 477, 121 S.E. 765 (1924).

**Drug Trafficking.** — The defendant's sentence was not disproportionate to her crimes although her more culpable co-conspirators received lesser or equivalent sentences after plea-arrangements where the sentences imposed upon defendant, albeit consecutive, were within the presumptive statutory range authorized for her drug trafficking offenses under the Structured Sentencing Act. State v. Parker, 137 N.C. App. 590, 530 S.E.2d 297 (2000).

**Escape.** — A sentence of imprisonment for 12 months for felonious escape did not constitute cruel and unusual punishment, in violation of this section. State v. Dixon, 5 N.C. App. 514, 168 S.E.2d 418 (1969).

**Kidnapping and Rape.** — Imposition on defendant of two concurrent terms of life imprisonment for kidnapping and first-degree rape did not constitute cruel and unusual punishment since the sentences were authorized by statute. State v. Squire, 302 N.C. 112, 273 S.E.2d 688 (1981).

**Letting Dogs Run at Large.** — As to fine or imprisonment for owners of bird dogs who permit them to run at large during the closed season for quail, see State v. Blake, 157 N.C. 608, 72 S.E. 1080 (1911).

**Imposition of two consecutive life sentences did not constitute cruel and unusual punishment** in violation of the State Constitution, where the defendant was convicted of four first-degree burglaries, three first-degree rapes, and eight first-degree sexual offenses. The sentence imposed was authorized under the statutes, and the sentence was not disproportionate to the crimes committed. State v. Woodard, 102 N.C. App. 687, 404 S.E.2d 6 (1990), cert. denied, 329 N.C. 504, 407 S.E.2d 550 (1991).

**Thirteen-year Old Sentenced to Life Imprisonment.** — A life sentence imposed on a 13-year old was not excessive as cruel and unusual punishment, where the sentence was imposed for a first-degree sexual offense, and the punishment was suitable both with regard to evolving community standards, the nature of the crime, as well as the defendant's reaction to the crime, the likelihood of his rehabilitation, and his home situation. State v. Green, 348 N.C. 588, 502 S.E.2d 819 (1998), cert. denied, 525 U.S. 1111, 119 S. Ct. 883, 142 L. Ed. 2d 783 (1999).

**Mandatory Life Sentence.** — Mandatory life sentence for first degree sexual offense does not constitute cruel and unusual punishment under the State or federal Constitution. Supreme Court of North Carolina has repeatedly rejected argument that a life sentence for first degree sexual offense is cruel and unusual punishment. State v. Norman, 100 N.C. App. 660, 397 S.E.2d 647 (1990).

**Manslaughter.** — Upon conviction of manslaughter, punishment for 9 years in the penitentiary would be upheld. State v. Lance, 149 N.C. 551, 63 S.E. 198 (1908).

Sentence of 12 to 20 years' imprisonment for involuntary manslaughter was within the discretionary limits fixed by statute, and while the punishment inflicted was substantial, the judgment pronounced did not come within the constitutional inhibition against "cruel or unusual punishments." State v. Smith, 238 N.C. 82, 76 S.E.2d 363 (1953). See also, State v. Brooks, 260 N.C. 186, 132 S.E.2d 354 (1963), in which the sentence imposed was for not less than 10 nor more than 20 years' imprisonment.

**Possession of Housebreaking Implements.** — A sentence of not less than 20 nor more than 30 years on a plea of guilty to the charge of unlawful possession of implements of housebreaking constituted cruel and unusual punishment within the meaning of this section. State v. Blackmon, 260 N.C. 352, 132 S.E.2d 880 (1963).

**Referral of Bail Setting to Another Judicial Officer Not Wrongful Confinement.** — Where the defendant was taken before a judicial officer for the setting of bail within a reasonable time, although the magistrate may have erred at that point by referring the defendant's case to another judicial officer for the setting of bail rather than setting reasonable bail himself, the error did not make the defendant's temporary further confinement an unreasonable seizure or "wrongful confinement" in any constitutional sense so as to necessitate suppression of his confession. State v. Simpson, 320 N.C. 313, 357 S.E.2d 332 (1987), cert. denied, 485 U.S. 963, 108 S. Ct. 1230, 99 L. Ed. 2d 430 (1988).

**Robbery.** — A sentence for robbery which was within the statutory maximum did not constitute the cruel and unusual punishment forbidden by this section. State v. Witherspoon, 271 N.C. 714, 157 S.E.2d 362 (1967).

**Vagrancy.** — The punishment for vagrancy could not exceed 30 days under the statute. In re Watson, 157 N.C. 340, 72 S.E. 1049 (1911).

**Worthless Check.** — A sentence to 18 months labor on the roads entered upon defendant's plea of guilty to a charge of drawing and uttering a worthless check was held not to be "cruel and unusual" in a constitutional sense. State v. White, 230 N.C. 513, 53 S.E.2d 436 (1949).

**False pretenses enhanced by habitual offender status.** — Defendant had a lengthy criminal record and was sentenced accordingly for G.S. 14-100 false pretenses, which sentence was enhanced by his status of being an habitual offender under G.S. 14-7.6; the sentence of 142 months to 180 months was within the range for a Class C level V felon, was not disproportionate to the defendant's 25-year history of criminal convictions, and was not cruel and unusual under U.S. Const. amends. VIII, XIV. State v. Ledwell, 171 N.C. App. 314, 614 S.E.2d 562, 2005 N.C. App. LEXIS 1212 (2005).

## Sec. 28. Imprisonment for debt.

There shall be no imprisonment for debt in this State, except in cases of fraud.

**History.** — The provisions of this section are similar to those of Art. I, § 16, Const. 1868.

**Legal Periodicals.** — For note on specific performance of separation agreements, see 58 N.C.L. Rev. 867 (1980).

For survey of 1980 tort law, see 59 N.C.L. Rev. 1239 (1981).

### CASE NOTES

I. In General.
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## I. IN GENERAL.

***Editor's Note.*** — *Some of the cases cited below were decided under former Art. I, § 16, Const. 1868.*

**Purpose.** — The purpose of this section is to prevent use of the criminal process to enforce the payment of civil obligations, directly or indirectly. State v. Caudle, 276 N.C. 550, 173 S.E.2d 778 (1970).

**Section Only Applicable to Actions Arising out of Contract.** — This section, which prohibits imprisonment for debt, is only applicable to actions arising out of or founded upon contract. State v. Locklear, 21 N.C. App. 48, 203 S.E.2d 63 (1974).

**And Not to Tort Actions.** — This section has no application to actions for tort; it is confined to causes of action arising ex contractu. Long v. McLean, 88 N.C. 3 (1883). See also, Ledford v. Smith, 212 N.C. 447, 193 S.E. 722 (1937).

**A fine or penalty imposed by a municipal ordinance is treated as a debt** and, under this section of the Constitution, a person from whom it is attempted to be collected is exempt from arrest. State v. Earnhardt, 107 N.C. 789, 12 S.E. 426 (1890).

**A judgment on a note is a debt** and the defendant cannot be arrested therefor. Stewart v. Bryan, 121 N.C. 46, 28 S.E. 18 (1897).

**Any judgment rendered for nonperformance is a debt** and can only be enforced by a levy on the sale of defendant's property. Defendant cannot be imprisoned therefor. Wilson v. Wilson, 261 N.C. 40, 134 S.E.2d 240 (1964).

**Costs of Prosecution Are Not Debt.** — Costs of prosecution against a prosecutor (upon acquittal of the accused or nolle prosequi entered), or against the accused upon a verdict of guilty, or a fine imposed, do not constitute a debt within the meaning of this section of the Constitution, and hence the defendant may be imprisoned for nonpayment of the same. State v. Wallin, 89 N.C. 578 (1883).

**Nor is the duty of maintaining an illegitimate child** such a debt as is contemplated by this section. State v. Palin, 63 N.C. 472 (1869); State v. Beasley, 75 N.C. 211 (1876).

**Taxes do not constitute a debt** within the meaning of the Constitution. State v. Locklear, 21 N.C. App. 48, 203 S.E.2d 63 (1974).

**Imprisonment for failure to pay a sum of money is prohibited except to enforce an appropriate judicial order** which has been willfully disobeyed so as to constitute contempt of court. Stanley v. Stanley, 226 N.C. 129, 37 S.E.2d 118 (1946).

**Punishment for Contempt.** — Willful failure of a husband to comply with the court's order to pay his wife an amount for support is a contempt, and can be punished as such by imprisonment, and is not within the constitutional inhibition against imprisonment for debt. Wilson v. Wilson, 261 N.C. 40, 134 S.E.2d 240 (1964).

**Specific Performance of Separation Agreement.** — The remedy of specific performance of a separation agreement contemplating enforcement by civil contempt proceedings is not available in this State. Sainz v. Sainz, 36 N.C. App. 744, 245 S.E.2d 372 (1978).

The enforcement of support payments provided in an extra-judicial separation agreement is accomplished as in the case of any other civil contract, i.e., through an action for breach of the contract seeking a judgment for sums due. Such an action, sounding in contract, is not enforceable by execution in personam in the form of imprisonment for civil contempt for noncompliance, by reason of the constitutional prohibition against imprisonment for debt. Sainz v. Sainz, 36 N.C. App. 744, 245 S.E.2d 372 (1978).

Plaintiff was entitled to a decree of specific performance ordering defendant to comply with a separation agreement which had not been incorporated into a judicial decree because the available remedy at law for the enforcement of such agreement was inadequate. Moore v. Moore, 297 N.C. 14, 252 S.E.2d 735 (1979).

**Payment of Restitution Is Valid Condition for Suspension of Sentence.** — Subject to the prohibition contained in this section against imprisonment for debt, except in cases of fraud, payment of restitution by a criminal defendant to the victims of his crime may be a valid condition for suspension of sentence. State v. McIntyre, 33 N.C. App. 557, 235 S.E.2d 920 (1977).

**Or for Acceptance of Plea Bargain.** — Payment of restitution by a criminal defendant to the victims of his crime may be a valid condition for acceptance of a plea bargain. But when restitution is ordered as result of a plea bargain, it must be to a specific aggrieved party, and this party must be named in the judgment. State v. McIntyre, 33 N.C. App. 557, 235 S.E.2d 920 (1977).

**But Not Suspension of Sentence on Condition that Defendant Pay Unrelated Civil Obligation.** — To suspend a sentence of imprisonment for a criminal act, however just the sentence may be per se, on condition that the defendant pay obligations unrelated to such criminal act, however justly owing, is a use of the criminal process to enforce the payment of a civil obligation, and lends itself to the oppressive action which this section is designed to forbid. To sustain the suspension of sentence upon such a condition would invite misuse of the practice of suspending sentence. It would substitute for the humane consideration and the objective reformation, upon which the practice ought to rest, an entirely different purpose.

State v. Caudle, 276 N.C. 550, 173 S.E.2d 778 (1970).

**For an order of restitution to be valid it must be related to the criminal act** for which defendant was convicted, or else the provision may run afoul of the constitutional provision prohibiting imprisonment for debt. State v. Froneberger, 81 N.C. App. 398, 344 S.E.2d 344 (1986).

**Provisions in probationary judgments which require restitution** are constitutionally permissible if they are related to the criminal act for which the defendant is convicted. State v. Bass, 53 N.C. App. 40, 280 S.E.2d 7 (1981).

**Cited** in Cobb v. Cobb, 54 N.C. App. 230, 282 S.E.2d 591 (1981); Northwestern Bank v. Moretz, 56 N.C. App. 710, 289 S.E.2d 614 (1982); Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

### II. FRAUD.

**The words "except in cases of fraud"** comprehend not only fraud in attempting to hinder, delay and defeat the collection of a debt by concealing property and other fraudulent devices, but embrace also fraud in making the contract, such as false representations, and fraud in incurring the liability; for instance, when an administrator commits a fraud by applying the funds of the estate to his own use, paying his own debts, and the like. Melvin v. Melvin, 72 N.C. 384 (1875).

**No Imprisonment for Debt Absent Fraud.** — This section clearly means that there shall at least be no imprisonment to enforce the payment of a debt under final process, unless it has been adjudged, upon an allegation duly made in the complaint and a corresponding issue found by a jury, that there has been fraud. Ledford v. Emerson, 143 N.C. 527, 55 S.E. 969, 10 L.R.A. (n.s.) 362 (1906); East Coast Fertilizer Co. v. Hardee, 211 N.C. 653, 191 S.E. 725 (1937).

**Section Inapplicable to Contracts Involving Fraud.** — This constitutional prohibition against imprisonment for debt has been held to apply to debt in the strict sense of an obligation arising out of contract, and hence would not apply to contracts involving fraud, including fraud in contracting the debt or incurring the obligation. Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967).

**A party's activities in adding "payment in full" language to a check** after it had been cashed by another party, and then attempting to use the check to defeat the other party's claim, constituted fraud within the intent of G.S. 1-410(4) and within this section. Koury v. Meyer, 44 N.C. App. 392, 261 S.E.2d 217, cert. denied, 299 N.C. 736, 267 S.E.2d 662 (1980).

**For case upholding the Worthless Check Law** as a valid exercise by the State of its police powers, see State v. Yarboro, 194 N.C. 498, 140 S.E. 216 (1927).

## Sec. 29. Treason against the State.

Treason against the State shall consist only of levying war against it or adhering to its enemies by giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. No conviction of treason or attainder shall work corruption of blood or forfeiture.

**History.** — The provisions of this section are similar to those of Art. I, § 37, Const. 1868, as amended in 1962.

## Sec. 30. Militia and the right to bear arms.

A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice.

**History.** — The provisions of this section are similar to those of Art. I, § 24, Const. 1868, as amended by the Convention of 1875.

### CASE NOTES

***Editor's Note.** — Most of the cases cited below were decided under former Art. I, § 24, Const. 1868, as amended by the Convention of 1875.*

**This section guarantees the right to bear arms** to the people in a collective sense, similar to the concept of a militia, and also to individuals. State v. Dawson, 272 N.C. 535, 159 S.E.2d 1 (1968).

**Purpose.** — The purpose of the constitutional guaranty of the right to bear arms is to secure a well-regulated militia. State v. Dawson, 272 N.C. 535, 159 S.E.2d 1 (1968).

The purpose of the declaration that a well-regulated militia is necessary to the security of a free state was to insure the existence of a State militia as an alternative to a standing army. Such armies were regarded as peculiarly obnoxious in any free government. State v. Dawson, 272 N.C. 535, 159 S.E.2d 1 (1968).

**"Militia".** — Militia is defined as the body of citizens in a state, enrolled for discipline as a military force, but not engaged in actual service except in emergencies, as distinguished from regular troops or a standing army. State v. Dawson, 272 N.C. 535, 159 S.E.2d 1 (1968).

**Law or Construction Destroying Right to Bear Arms Would Be Unconstitutional.** — Any statute, or construction of a common-law rule, which would amount to a destruction of the right to bear arms would be unconstitutional. State v. Dawson, 272 N.C. 535, 159 S.E.2d 1 (1968).

**Individual Has Right to Possess Weapon.** — The individual has the right, subject to reasonable regulation by the legislature, to possess a weapon in order to exercise his common-law right of self-defense. State v. Dawson, 272 N.C. 535, 159 S.E.2d 1 (1968).

**Convicted Felons.** — G.S. 14-451.1 did not violate the convicted felon's due process or equal protection rights because plaintiff's right to possess firearms was not a vested right and the statutory scheme treated all felons the same and served to protect the health, welfare, and safety of the citizens of North Carolina. Britt v. State, 185 N.C. App. 610, 649 S.E.2d 402, 2007 N.C. App. LEXIS 1938 (2007).

**But Right Is Subject to Regulation.** — The right of individuals to bear arms is not absolute, but is subject to regulation. State v. Dawson, 272 N.C. 535, 159 S.E.2d 1 (1968).

The right to bear arms, which is protected and safeguarded by the federal and State Constitutions, is subject to the authority of the General Assembly, in the exercise of the police power, to regulate, but the regulation must be reasonable and not prohibitive, and must bear a fair relation to the preservation of the public peace and safety. State v. Dawson, 272 N.C. 535, 159 S.E.2d 1 (1968).

For case stating that the last clause of this provision constitutes an exception to the first and indicates the extent to which the right of the people to bear arms can be restricted, that is, that the legislature can prohibit the carrying of concealed weapons, but no further, see State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921).

**Right to Bear Arms and Carrying of Concealed Weapons Distinguished.** — This provision of the Constitution plainly observes the distinction between the "right to keep and bear arms" and "the practice of carrying concealed weapons." The first, it is declared, shall not be infringed, while the latter may be prohibited. Even without this constitutional provision, the legislature may by law regulate the right to bear arms in a manner conducive to the public peace. State v. Speller, 86 N.C. 697 (1882), approved in State v. Reams, 121 N.C. 556, 27 S.E. 1004 (1897).

**This section does not license self-appointed vigilantes,** extremist groups, hoodlums, or any persons whomsoever to arm themselves for the purpose of intimidating the people and then, so long as they flaunt those weapons, to roam with impunity to the terror of the people. State v. Dawson, 272 N.C. 535, 159 S.E.2d 1 (1968).

**Common-Law Offense Not Abrogated.** — The constitutional guaranty of the right to bear arms does not abrogate the common-law offense of going armed with unusual weapons to the terror of the people. State v. Dawson, 272 N.C. 535, 159 S.E.2d 1 (1968).

**Cited** in State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

## Sec. 31. Quartering of soldiers.

No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war but in a manner prescribed by law.

**History.** — The provisions of this section are similar to those of Art. I, § 36, Const. 1868.

## Sec. 32. Exclusive emoluments.

No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.

**History.** — The provisions of this section are similar to those of Art. I, § 7, Const. 1868, as amended in 1946.

**Legal Periodicals.** — For note on the six year statutory bar to products liability actions, in light of Tetterton v. Long Manufacturing Co., 314 N.C. 44, 332 S.E.2d 67 (1985), see 64 N.C.L. Rev. 1157 (1986).

For note, "Municipal Ownership of Cable Television Systems: Madison Cablevision, Inc. v. City of Morganton," see 68 N.C.L. Rev. 1295 (1990).

### CASE NOTES

***Editor's Note.*** — *Most of the cases cited below were decided under former Art. I, § 7, Const. 1868, before and after its amendment in 1946.*

**The purpose of this constitutional provision** was not to prevent the community from exercising legislatively authorized powers to operate public enterprises, but to prevent the community from surrendering its power to another person or set of persons by grant of exclusive or separate emoluments or privileges unless they were granted in consideration of public services; it is not retention of powers, but alienation of powers, that is prohibited. Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 386 S.E.2d 200 (1989).

**Fundamental Safeguards.** — The wisdom and foresight of our ancestors is nowhere more clearly shown than in providing these fundamental safeguards against partial and class legislation, the insidious and ever-working foes of free and equal government. Simonton v. Lanier, 71 N.C. 498 (1874).

**Counties Not Within Purview of Section.** — Counties, as political subdivisions of the State, do not seem to be within the purview of this section, considering the vast number of local legislative acts, including ABC laws in contradiction to the general prohibition law, which are passed each session by the General Assembly. Mathis v. North Carolina, 266 F. Supp. 841 (M.D.N.C. 1967).

**This section does not preclude the legislature from making classifications and distinctions in the application of laws,** provided they are reasonable and just and not arbitrary. Motley v. State Bd. of Barber Exmrs., 228 N.C. 337, 45 S.E.2d 550, 175 A.L.R. 253 (1947).

This provision does not forbid all classifications of persons with reference to the imposition of legal duties and obligations. State v. Knight, 269 N.C. 100, 152 S.E.2d 179 (1967); Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983).

**Motivation of Legislation Determinative.** — The constitutional limitation contained in this section has been frequently invoked by the Supreme Court to strike down legislation conferring special privileges not in consideration of public service; but where the motivation is for a public purpose and in the public interest, and does not confer exclusive privilege, legislation has been upheld. Brumley v. Baxter, 225 N.C. 691, 36 S.E.2d 281, 162 A.L.R. 930 (1945); State v. Knight, 269 N.C. 100, 152 S.E.2d 179 (1967).

The limitation of this section, like that of N.C. Const., Art. I, § 19, does not apply to an exemption from a duty imposed upon citizens generally if the purpose of the exemption is the promotion of the general welfare, as distinguished from the benefit of the individual, and if there is reasonable basis for the legislature to conclude that the granting of the exemption would be in the public interest. State v. Knight, 269 N.C. 100, 152 S.E.2d 179 (1967); Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983).

**This section constitutes a specific constitutional prohibition against gifts of public money,** and the legislature has no power to compel or even to authorize a municipal corporation to pay a gratuity to an individual to adjust a claim which the municipality is under no legal obligation to pay. Brown v. Board of Comm'rs, 223 N.C. 744, 28 S.E.2d 104 (1943).

**Statutes Which Confer Benefits on a Particular Group of Persons.** — A statute which confers an exemption that benefits a particular group of persons is not an exclusive emolument or privilege within the meaning of this section, if: (1) the exemption is intended to promote the general welfare rather than the benefit of the individual, and (2) there is a reasonable basis for the legislature to conclude the granting of the exemption serves the public interest. Town of Emerald Isle ex rel. Smith v. State, 320 N.C. 640, 360 S.E.2d 756 (1987).

**Punitive Damages Cap.** — Section 1D-25, placing a cap on an award of punitive damages, is not unconstitutional special legislation, because it applies equally to all defendants and creates no distinction between groups. Rhyne v.

K-Mart Corp., 149 N.C. App. 672, 562 S.E.2d 82, 2002 N.C. App. LEXIS 316 (2002), aff'd, 358 N.C. 160, 594 S.E.2d 1 (2004).

**Section 1-50(6) does not grant "exclusive or separate emoluments or privileges"** to the persons it protects in violation of this section. Tetterton v. Long Mfg. Co., 314 N.C. 44, 332 S.E.2d 67 (1985).

**Section 62-2 does not confer an exclusive emolument or privilege** by creating a private benefit only for those residents of unserved areas in violation of this section. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994).

**Statutes of Limitations.** — Section 1-50(6) (now G.S. 1-50(a)(6)) does not grant "exclusive or separate emoluments or privileges" to the persons it protects in violation of this section. Tetterton v. Long Mfg. Co., 314 N.C. 44, 332 S.E.2d 67 (1985).

**Former employee did not adequately allege a free speech claim, an equal protection claim, and an exclusive emoluments claim when she had an adequate state remedy for those violations** because the employee's claim under the Whistleblower Act, G.S. 126-86, was an adequate state law remedy for her alleged free speech violation, her claim of misappropriation of state funds was expressly covered by the Act, G.S. 126-84, and thus was an adequate state law remedy for her exclusive emoluments clause claim; because the employee's equal protection claim alleged discrimination based on activities protected by the Whistleblower Act, it was also precluded. Helm v. Appalachian State Univ., — N.C. App. —, 670 S.E.2d 571, 2008 N.C. App. LEXIS 2251 (2008).

**Validity of § 24-5.** — The Legislature could reasonably have concluded that the classification scheme established by G.S. 24-5 would best serve to further important and legitimate public purposes, including compensation of a plaintiff for the loss-of-use value of a damage award, the prevention of unjust enrichment to liability insurers who are required by law to maintain claim reserves on which interest is earned, and the promotion of settlement by these insurers, who unlike self-insurers, have as their primary business the insuring, investigation, defense and settlement of claims. The Legislature could have reasonably concluded that the distinction between defendants with liability insurance and those without was a valid one, and that the public welfare would be best served by such a classification. Therefore, G.S. 24-5 does not create a special emolument or privilege within the meaning of this section. Lowe v. Tarble, 312 N.C. 467, 323 S.E.2d 19 (1984), aff'd on rehearing, 313 N.C. 460, 329 S.E.2d 648 (1985).

Section 24-5 does not violate N.C. Const., Art. I, §§ 19 and 32 or the equal protection and due process clauses of U.S. Const., Amend. XIV. Harris v. Scotland Neck Rescue Squad, Inc., 75 N.C. App. 444, 331 S.E.2d 695, cert. denied, 314 N.C. 329, 333 S.E.2d 486 (1985).

**Escrow fund which a town created to help it defray the costs of condemning land** so a public road could be widened and improved promoted the public welfare, and the trial court ruled correctly that the fund was not an exclusive emolument that violated N.C. Const. art. I, § 32, even though property owners who lived along the road contributed to the fund. Town of Highlands v. Hendricks, 164 N.C. App. 474, 596 S.E.2d 440, 2004 N.C. App. LEXIS 1009 (2004), cert. denied, — N.C. —, 605 S.E.2d 149 (2004).

**Section 53-229, relating to the acquisition and control of certain nonbank banking institutions,** does not violate the commerce clause of the U.S. Constitution, nor the equal protection, exclusion emoluments and antimonopoly provisions of N.C. Const., Art. I, §§ 19, 32 and 34. Citicorp v. Currie, 75 N.C. App. 312, 330 S.E.2d 635, cert. denied and appeal dismissed, 314 N.C. 537, 314 N.C. 538, 335 S.E.2d 15, 335 S.E.2d 16, 335 S.E.2d 15, 335 S.E.2d 16 (1985).

**Extension of city council term of office** did not result in an exclusive emolument in violation of the state Constitution. Crump v. Snead, 134 N.C. App. 353, 517 S.E.2d 384, 1999 N.C. App. LEXIS 760 (1999), cert. denied, 351 N.C. 101, 541 S.E.2d 143 (1999).

**The State cannot authorize a city to donate property,** or to grant privileges to one class of citizens not enjoyed by all, except in consideration of public services. Brown v. Board of Comm'rs, 223 N.C. 744, 28 S.E.2d 104 (1943); Brumley v. Baxter, 225 N.C. 691, 36 S.E.2d 281, 162 A.L.R. 930 (1945).

**City's refusal to grant cable television franchises to private applicants** did not violate the exclusive emoluments and monopoly clauses of this section and N.C. Const., Art. I, § 34, or the anti-monopoly and unfair trade practices of Chapter 75. Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 386 S.E.2d 200 (1989).

**An expenditure by a municipality for special training of a police officer** does not grant an exclusive emolument or privilege to the officer contrary to this section. Green v. Kitchin, 229 N.C. 450, 50 S.E.2d 545 (1948), discussed in 27 N.C.L. Rev. 500 (1949).

**A pension paid a governmental employee for long and efficient service** is not an emolument which, by this section, cannot be paid. To the contrary, it is a deferred portion of the compensation earned for services rendered. Great Am. Ins. Co. v. Johnson, 257 N.C. 367, 126 S.E.2d 92 (1962).

**Benefits received by State employees under the Retirement Fund** are deferred payments of salary for services rendered, and therefore such payments do not offend this section of the State Constitution. Bridges v. City of Charlotte, 221 N.C. 472, 20 S.E.2d 825 (1942).

**Allowances to which a member of the Teachers' and State Employees' Retirement System is entitled** upon retirement constitute compensation for public services previously rendered and do not violate this section. Harrill v. Teachers' & State Employees' Retirement Sys., 271 N.C. 357, 156 S.E.2d 702 (1967).

**Severance Pay.** — Where county manager worked one month after giving notice of his resignation and received all compensation due him under the terms of his employment with the county, severance pay would be compensation beyond that due for services rendered and, thus, constitutionally impermissible. Leete v. County of Warren, 341 N.C. 116, 462 S.E.2d 476 (1995).

Severance pay to county manager who voluntarily resigned violated North Carolina Constitution, Art. 1, § 32, because county manager was to be compensated for duties that were not performed, since the record reflected that the compensation was not for prior services rendered, and he was paid all benefits due him. Leete v. County of Warren, 341 N.C. 116, 459 S.E.2d 232 (1995).

**Statute including deputy sheriffs within term "employee" as used in Workers' Compensation Act** was consonant with the provisions of this section. Towe v. Yancey County, 224 N.C. 579, 31 S.E.2d 754 (1944).

**Extinguishment of County's Subrogation Lien Against Injured Employee.** — Trial court did not abuse its discretion in extinguishing a county's subrogation lien against a deputy sheriff regarding a settlement that he received following an injury in the course of his employment because G.S. 97-10.2(j) did not violate the Exclusive Emoluments Clause of N.C. Const. art. I, § 32. Helsius v. Robertson, 174 N.C. App. 507, 621 S.E.2d 263, 2005 N.C. App. LEXIS 2469 (2005), appeal dismissed, review denied, 360 N.C. 363, 629 S.E.2d 851, recons. denied, 360 N.C. 533, 633 S.E.2d 815 (2006).

**Services in the armed forces during war are "public services"** within the meaning of this section. Brumley v. Baxter, 225 N.C. 691, 36 S.E.2d 281, 162 A.L.R. 930 (1945); Motley v. State Bd. of Barber Exmrs., 228 N.C. 337, 45 S.E.2d 550, 175 A.L.R. 253 (1947).

**Statute making certain war veterans eligible for license to practice barbering** without being examined did not violate this section. Motley v. State Bd. of Barber Exmrs., 228 N.C. 337, 45 S.E.2d 550, 175 A.L.R. 253 (1947).

**Loans to Students.** — Session Laws 1967, c. 1177, authorizing the State Education Assistance Authority to issue revenue bonds and to use the proceeds therefrom for making loans to "residents of this State to enable them to obtain an education in an eligible institution," does not unconstitutionally authorize use of public funds in violation of this section. State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970).

**Collecting from Only Those Patients Who Can Pay.** — The law makes no unconstitutional discrimination between classes when it charges all tubercular patients the same rate, but actually collects only from those who can pay. Graham v. Reserve Life Ins. Co., 274 N.C. 115, 161 S.E.2d 485 (1968).

**Grant of Special Privilege to Named Person to Facilitate Public Transportation.** — Though, as a rule, a grant of a special privilege, not conferred upon persons generally, to a particular man for his own peculiar benefit, naming him, may be unconstitutional, the legislature unquestionably has the power, in order to provide for the public convenience or to facilitate transportation of persons and property, to confer on a designated person the right to build a bridge, or to establish a ferry, with the power to charge tolls for the use of such crossings, and, in addition, to exempt the servant who may be placed in charge from all public burdens. State v. Womble, 112 N.C. 862, 17 S.E. 491 (1893); State v. Knight, 269 N.C. 100, 152 S.E.2d 179 (1967).

**Grant of a special charter to a railroad or other like corporation** is not in conflict with this section of the Constitution, the charters of public service corporations coming directly within the exception contained in this provision. Reid v. Norfolk S.R.R., 162 N.C. 355, 78 S.E. 306 (1913).

**As to grant of charters to municipal corporations,** as agencies of the State, created for the benefit of the public, see Kornegay v. City of Goldsboro, 180 N.C. 441, 105 S.E. 187 (1920).

**Contract to Relieve Railway of Expense of Removing Tracks.** — Where the State Highway Commission agreed to appropriate a sum of money for the improvement of a city street upon condition that tracks and facilities of a street railway company be removed therefrom, and the railway company was operating under a franchise having 20 more years to run, which provided that the railway company should save the city harmless from any damage resulting from the construction of its tracks, and where the city entered into a contract with the railway company providing that in consideration of the abandonment of its franchise along said street the city would acquire for it an alternate right-of-way and would remove the tracks from the street, the court held that the promise by the city to remove the tracks did not constitute a special emolument not in consideration of public service. Boyce v. City of Gastonia, 227 N.C. 139, 41 S.E.2d 355 (1947).

**A provision in the charter of a warehouse corporation** to the effect that such corporation should not be liable for loss or damages not provided for in its warehouse receipt or contract attempted to confer exclusive privileges and was therefore unconstitutional under this section. A.H. Motley & Co. v. Southern Finishing & Whse. Co., 122 N.C. 347, 30 S.E. 3 (1898); A.H. Motley Co. v. Southern Finishing & Whse. Co., 124 N.C. 232, 32 S.E. 555 (1899).

**A provision in a bank's charter** allowing it to charge more than the legal rate of interest was void under this section of the Constitution where no public services were rendered in consideration of the grant. Simonton v. Lanier, 71 N.C. 498 (1874).

**Private Act Incorporating Bank and Authorizing Summary Judgment on Note.** — This provision of the State Constitution did not make invalid a provision in a private act incorporating the Bank of Newbern which authorized summary judgment and execution against one who defaulted in the payment of a note, as such privilege was not a gift, but the consideration for it was the public good, to be derived to the citizens at large from the establishment of the bank. President & Dirs. of Bank of Newbern v. Taylor, 6 N.C. 266 (1813); State v. Knight, 269 N.C. 100, 152 S.E.2d 179 (1967).

**Public-Local Law as to Sale of Claims Against Closed Banks.** — Public-local laws providing that depositors of certain closed banks might sell their claims for deposits to persons indebted to the banks at the date of their closing, and that the liquidation agents of such banks should accept such purchased claims at their face value in payment of the purchasers' debts to the banks, would be held unconstitutional and void, being in violation of this section. Edgerton v. Hood, 205 N.C. 816, 172 S.E. 481 (1934).

**Exempting corporations chartered prior to a certain date** from proscription against emptying into streams substances inimical to fish was held to violate this section. State v. Glidden Co., 228 N.C. 664, 46 S.E.2d 860 (1948).

**A local public law which provided that the provisions of former § 44-14 should be read into private construction bonds** was in contravention of this section and N.C. Const., Art. I, § 31, the statute failing to operate uniformly and equally in giving special privilege to the residents of the particular county and imposing heavier burdens on certain sureties. J.O. Plott Co. v. H.K. Ferguson Co., 202 N.C. 446, 163 S.E. 688 (1932).

**Law Burdening Business in One Portion of State and Not Others.** — Any law which, purporting to operate on a particular class, places upon those engaged in business in a portion of the State a burden for a privilege which is exercised freely and without additional charge by those engaged in the business in other parts of the State is arbitrary in classification, because it discriminates within the class originally selected and extends to the latter a privilege and immunity not accorded to those who must, under the law, pay the additional exaction or quit the business. State v. Harris, 216 N.C. 746, 6 S.E.2d 854, 128 A.L.R. 658 (1940).

**Denying a nonprofit corporation the right to construct and operate its proposed hospital** on its own property with its own funds with adequate staff and equipment was a grant to existing hospitals of exclusive privileges forbidden by this section. In re Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

**Maintenance of Market House.** — It is within the power of a city or town to provide, by contract with its citizens, a market house, and to exclude, with certain reasonable exceptions, the sale of fish at other places, it appearing that, under the contract, the market house was to remain under the full control of the municipal authorities, and that reasonable accommodation had been provided for the vendors, with reasonable charges for the stalls. State v. Perry, 151 N.C. 661, 65 S.E. 915 (1909).

**The State Constitution forbids the granting of an exclusive license.** Durham v. North Carolina, 395 F.2d 58 (4th Cir. 1968).

**And the holder of a nonexclusive franchise has no monopoly,** and cannot complain of competition from a publicly created utility system. Phrased another way, the creation by a state of a competing public utility does not amount to a "taking" compensable under U.S. Const., Amend. XIV. Durham v. North Carolina, 395 F.2d 58 (4th Cir. 1968).

**An act authorizing the grant of an exclusive franchise to operate a race track** was held unconstitutional as being in violation of this section, notwithstanding a municipality receives a fraction of the gross receipts. State ex rel. Taylor v. Carolina Racing Ass'n, 241 N.C. 80, 84 S.E.2d 390 (1954), commented on in 33 N.C.L. Rev. 109 (1954).

The exclusive privilege granted to the holder of a franchise to operate a dog race track under a statute is not in consideration of public service within the meaning of this section, and the statute is unconstitutional. State v. Felton, 239 N.C. 575, 80 S.E.2d 625 (1954).

**Regulation of Vehicles for Hire.** — A municipal ordinance requiring all operators of passenger motor vehicles for hire within the city to deposit with the treasurer of the city policies of liability insurance in responsible companies authorized to do business in the State in a stipulated amount for each car operated, or cash or securities in the sum required, was in contravention of this section and of N.C. Const., Art. I, § 34, in that the ordinance failed to provide that the security required might be furnished by one or more solvent individual sureties. State v. Sasseen, 206 N.C. 644, 175 S.E. 142 (1934), commented on in 13 N.C.L. Rev. 222 (1935).

**Regulation of Ambulance Service.** — For case holding county ordinance regulating ambulance service unconstitutional, see Whaley v. Lenoir County, 5 N.C. App. 319, 168 S.E.2d 411 (1969).

As to the unconstitutionality of former G.S. 153-9(58) a 2 because of the possible retroactive application of the grandfather clause, see Whaley v. Lenoir County, 5 N.C. App. 319, 168 S.E.2d 411 (1969).

Former G.S. 153-9(58) a 6, granting to counties the power to set minimum limits of liability insurance coverage for ambulances, was not void as being in contravention of constitutional prohibitions against monopolies and exclusive emoluments, since the paragraph did not provide that liability insurance would be the exclusive method of indemnifying persons or property against loss due to negligent operation of the ambulance service. Whaley v. Lenoir County, 5 N.C. App. 319, 168 S.E.2d 411 (1969).

**Regulation as to Practice of Medicine.** — An act prohibiting the practice of medicine without registration held not within the inhibition of this section merely because it contained a proviso to the effect that the act would not apply to midwives nor to nonresident consulting physicians, as this did not constitute an exclusive privilege within the meaning of the section. State v. Van Doran, 109 N.C. 864, 14 S.E. 32 (1891). See also, State v. Biggs, 133 N.C. 729, 46 S.E. 401 (1903).

**Regulation as to Pilots.** — The selection by a commission of persons qualified to act as pilots is not violative of this section. St. George v. Hardie, 147 N.C. 88, 60 S.E. 920 (1908).

**Statute Providing for Tile Contractor's License.** — Statute requiring a license for any person, firm or corporation undertaking to lay, set or install ceramic tile, marble or terrazzo floors or walls violated this section. Roller v. Allen, 245 N.C. 516, 96 S.E.2d 851 (1957).

**Restrictions on vehicular traffic** contained in Session Laws 1983, Chapter 539 were intended to promote the general welfare of the public and were reasonably based to further that intent. Thus, those restrictions do not violate this section. Town of Emerald Isle ex rel. Smith v. State, 320 N.C. 640, 360 S.E.2d 756 (1987).

**Agreements to Pay Basketball Team 50% of Coliseum's Profits.** — The provisions of agreements between the defendant city and defendant owner of a competitive basketball team which required the team and team owners to be paid 50% of the City's Coliseum parking, food and beverage profits did not violate the prohibition on exclusive or separate emoluments or privileges where the purpose of the agreements, all provisions included, was to promote the public benefit by means of optimum use of the Coliseum. Peacock v. Shinn, 139 N.C. App. 487, 533 S.E.2d 842, 2000 N.C. App. LEXIS 991 (2000), cert. denied, 353 N.C. 267, 546 S.E.2d 110 (2000).

**Manufacturing Incentives.** — Taxpayers failed to state a claim for relief under the Public Purpose Doctrine, N.C. Const., Art. V, § 2(1) and (7), regarding their challenge to state and local incentives provided to the business to locate its computer manufacturing facility in the county since they did not show that a public purpose was not involved; likewise, they also failed to state a claim for relief under the Exclusive Emoluments clause, N.C. Const., Art. I, § 32, for the same reason, especially since the incentives further a proper public purpose of providing economic incentives to recruit business to the state to further the general welfare of the public. Blinson v. State, 186 N.C. App. 328, 651 S.E.2d 268, 2007 N.C. App. LEXIS 2191 (2007), review denied, appeal dismissed, 362 N.C. 355, 661 S.E.2d 240 (2008).

**Applied** in Lamb v. Wedgewood S. Corp., 55 N.C. App. 686, 286 S.E.2d 876 (1982); White v. Pate, 308 N.C. 759, 304 S.E.2d 199 (1983); State v. McCleary, 65 N.C. App. 174, 308 S.E.2d 883 (1983); State v. Stanley, 79 N.C. App. 379, 339 S.E.2d 668 (1986); State ex rel. Martin v. Preston, 325 N.C. 438, 385 S.E.2d 473 (1989); Myers v. Town of Plymouth, 135 N.C. App. 707, 522 S.E.2d 122, 1999 N.C. App. LEXIS 1237 (1999).

**Cited** in Loughlin v. North Carolina State Bd. of Registration, 32 N.C. App. 351, 232 S.E.2d 219 (1977); Wood v. City of Fayetteville, 43 N.C. App. 410, 259 S.E.2d 581 (1979); In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979); In re DeLancy, 67 N.C. App. 647, 313 S.E.2d 880 (1984); State ex rel. Banking Comm'n v. Citicorp Sav. Indus. Bank, 74 N.C. App. 474, 328 S.E.2d 895 (1985); Town of Emerald Isle v. State, 78 N.C. App. 736, 338 S.E.2d 581 (1986); Empire Distribs. of N.C., Inc. v. Schieffelin & Co., 677 F. Supp. 847 (W.D.N.C. 1988); Gwathmey v. State ex rel. Dep't of Env't, Health & Natural Resources, 342 N.C. 287, 464 S.E.2d 674 (1995); Gwathmey v. State ex rel. Dep't of Env't, Health & Natural Resources, 342 N.C. 287, 464 S.E.2d 674 (1995); Royal v. State, 153 N.C. App. 495, 570 S.E.2d 738, 2002 N.C. App. LEXIS 1167 (2002); Bailey v. Flue-Cured Tobacco Coop. Stabilization Corp., 158 N.C. App. 449, 581 S.E.2d 811, 2003 N.C. App. LEXIS 1179 (2003).

## Sec. 33. Hereditary emoluments and honors.

No hereditary emoluments, privileges, or honors shall be granted or conferred in this State.

**History.** — The provisions of this section are similar to those of Art. I, § 30, Const. 1868.

**Legal Periodicals.** — For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

## Sec. 34. Perpetuities and monopolies.

Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed.

**Cross References.** — For prohibition against exclusive emoluments other than in consideration of public services, see N.C. Const., Art. I, § 32.

**History.** — The provisions of this section are similar to those of Art. I, § 31, Const. 1868.

**Legal Periodicals.** — For article, "A Proposal for a Simple and Socially Effective Rule Against Perpetuities," see 66 N.C.L. Rev. 545 (1988).

For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

### CASE NOTES

***Editor's Note.** — Some of the cases cited below were decided under former Art. I, § 31, Const. 1868.*

**The common-law rule against perpetuities is recognized and enforced** in this State. The rule is not one of construction, but a positive mandate of law, to be obeyed irrespective of the question of intention. Its primary purpose is to restrict the permissible creation of future interests and prevent undue restraint upon or suspension of the right of alienation. Whenever the future interest takes effect or the right of alienation is suspended beyond the period stipulated in the rule, it is violative thereof. Mercer v. Mercer, 230 N.C. 101, 52 S.E.2d 229 (1949); Parker v. Parker, 252 N.C. 399, 113 S.E.2d 899 (1960).

The common-law rule against perpetuities has been long recognized and enforced in this jurisdiction, and its application has the continuing sanction of this section. North Carolina Nat'l Bank v. Norris, 21 N.C. App. 178, 203 S.E.2d 657 (1974).

**Early Vesting of Estates Favored.** — Where, by a correct interpretation of a will, it will reasonably be allowed, the law will favor the early vesting of estates against the interests of a contingent remainderman. Walker v. Trollinger, 192 N.C. 744, 135 S.E. 871 (1926).

**The rule against perpetuities applies to private trusts.** And when a private trust violates the rule, the court will not limit the duration of the trust, but will declare the whole trust invalid. Mercer v. Mercer, 230 N.C. 101, 52 S.E.2d 229 (1949).

**Statute Failing to Provide for Successors to Office Did Not Create Perpetuity.** — The General Assembly having failed to appoint or provide for the election of successors to the highway and sinking fund commissioners of Madison County, who were appointed for a four or six-year term by Public-Local Laws of 1931, c. 341, the General Assembly would be presumed to acquiesce in their continuance in office, and the General Assembly having power to terminate, change or continue the appointments, it would not be held that it intended to create perpetuities or exclusive emoluments in violation of any of the provisions of this article; said commissioners thus would continue to hold office with power to discharge the duties thereof. Freeman v. Board of County Comm'rs, 217 N.C. 209, 7 S.E.2d 354 (1940).

**The State Constitution forbids the granting of an exclusive license.** Durham v. North Carolina, 395 F.2d 58 (4th Cir. 1968).

**And the holder of a nonexclusive franchise has no monopoly,** and cannot complain of competition from a publicly created utility system. Phrased another way, the creation by a state of a competing public utility does not amount to a "taking" compensable under U.S. Const., Amend. XIV. Durham v. North Carolina, 395 F.2d 58 (4th Cir. 1968).

**The distinctive characteristics of a monopoly** are (1) control of so large a portion of the market of a certain commodity that (2) competition is stifled, (3) freedom of commerce is restricted and (4) the monopolist controls prices. American Motors Sales Corp. v. Peters, 311 N.C. 311, 317 S.E.2d 351 (1984).

**An act authorizing the grant of an exclu-**

**sive franchise to operate a race track** was held unconstitutional as being in violation of this section. State ex rel. Taylor v. Carolina Racing Ass'n, 241 N.C. 80, 84 S.E.2d 390 (1954).

An act which provided for the granting of an exclusive franchise to operate a dog race track was held unconstitutional in State v. Felton, 239 N.C. 575, 80 S.E.2d 625 (1954).

**City's refusal to grant cable television franchises to private applicants** did not violate the exclusive emoluments and monopoly clauses of N.C. Const., Art. I, § 32 and this section, or the antimonopoly and unfair trade practices of Chapter 75. Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 386 S.E.2d 200 (1989).

**As to prohibitive regulations upon engaging in business,** see State v. Harris, 216 N.C. 746, 6 S.E.2d 854, 128 A.L.R. 658 (1940).

**Statute Providing for Tile Contractor's License.** — Statute requiring a license for any person, firm or corporation undertaking to lay, set or install ceramic tile, marble or terrazzo floors or walls violated this section. Roller v. Allen, 245 N.C. 516, 96 S.E.2d 851 (1957).

**Statute Requiring Examination of Former Dentists Returning to State.** — Statute providing that a licensed dentist who retired or removed from the State had to pass an examination upon returning to the State did not confer exclusive emoluments and privileges on continuously practicing dentists contrary to the provisions of this section and N.C. Const., Art. I, § 33. Allen v. Carr, 210 N.C. 513, 187 S.E. 809 (1936).

**Statute Regulating Practice of Optometry.** — A portion of G.S. 90-115, relating to the practice of optometry, was held violative of this section. Palmer v. Smith, 229 N.C. 612, 51 S.E.2d 8 (1948).

**Statute relating to licensing and supervision of photographers** tended to create a monopoly in violation of this section. State v. Ballance, 229 N.C. 764, 51 S.E.2d 731 (1949).

**Regulation of Ambulance Service.** — For case holding county ordinance regulating ambulance service unconstitutional, see Whaley v. Lenoir County, 5 N.C. App. 319, 168 S.E.2d 411 (1969).

Former G.S. 153-9(58) a 6 was not void as being in contravention of constitutional prohibitions against monopolies and exclusive emoluments, since the paragraph did not provide that liability insurance would be the exclusive method of indemnifying persons or property against loss due to negligent operation of the ambulance service. Whaley v. Lenoir County, 5 N.C. App. 319, 168 S.E.2d 411 (1969).

Because of the possible retroactive application of the grandfather rights provided for, former G.S. 153-9(58) a 2 was unconstitutional, since it invaded the personal and property rights guaranteed and protected by the Constitution. Whaley v. Lenoir County, 5 N.C. App. 319, 168 S.E.2d 411 (1969).

**As to selection of persons qualified to act as pilots** by a commission, see St. George v. Hardie, 147 N.C. 88, 60 S.E. 920 (1908).

**As to ordinance granting the exclusive privilege to construct and maintain waterworks** within the corporate limits of a town, see Elizabeth City Water & Power Co. v. City of Elizabeth City, 188 N.C. 278, 124 S.E. 611 (1924).

**As to stipulations in partial restraint of trade,** see Tobacco Growers Coop. Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174, 33 A.L.R. 231 (1923).

**As to the regulation of cleaning and pressing plants,** see State v. Harris, 216 N.C. 746, 6 S.E.2d 854, 128 A.L.R. 658 (1940).

**Denying a nonprofit corporation the right to construct and operate its proposed hospital** on its own property with its own funds with adequate staff and equipment establishes a monopoly in the existing hospitals contrary to the provisions of this section. In re Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

**Plaintiff's Monopolistic Conduct No Defense to Defendant's Unfair Competition.** — Even if plaintiff's conduct in protecting its property was a monopolistic practice, it was not a defense to an action for injunctive relief and compensatory damages brought by plaintiffs against defendants for alleged unfair competition where defendants' conduct had been determined to be unfair competition. United Artists Records, Inc. v. Eastern Tape Corp., 19 N.C. App. 207, 198 S.E.2d 452 (1973), cert. denied, 284 N.C. 255, 200 S.E.2d 653 (1974).

**Automobile Dealer Franchise.** — The State can require that if an automobile manufacturer gives a franchise to a dealer to sell automobiles, that the manufacturer include in the terms of the franchise agreement the right that the dealer have an exclusive franchise in a certain trade area so long as the dealer abides by the terms of the franchise agreement. American Motors Sales Corp. v. Peters, 58 N.C. App. 684, 294 S.E.2d 764 (1982), rev'd on other grounds, 311 N.C. 311, 317 S.E.2d 351 (1984).

Grant of franchise to automobile dealer is not an agreement between competitors not to compete, but a contract between a manufacturer and a dealer. The State has enacted legislation which gives automobile dealers some protection after they have made investments and taken other action, relying on contracts they have made, and the State has the power to do this. American Motors Sales Corp. v. Peters, 58 N.C. App. 684, 294 S.E.2d 764 (1982), rev'd on other grounds, 311 N.C. 311, 317 S.E.2d 351 (1984).

Under G.S. 20-305(5), an automobile manufacturer may give a dealer the exclusive right to sell its automobiles in a trade area without violating this section. For the General Assembly to require the manufacturer to do what it could bargain to do if it desired to execute a contract is not the granting of a monopoly. American Motors Sales Corp. v. Peters, 58 N.C. App. 684, 294 S.E.2d 764 (1982), rev'd on other grounds, 311 N.C. 311, 317 S.E.2d 351 (1984).

Section 20-305(5) is not unconstitutional on its face as allowing monopolies. American Motors Sales Corp. v. Peters, 58 N.C. App. 684, 294 S.E.2d 764 (1982), rev'd on other grounds, 311 N.C. 311, 317 S.E.2d 351 (1984).

**Cooperative Stabilization Corporation.** — Tobacco warehouses were not able to assert constitutional claims of deprivation of property rights and prohibition against monopolies against a tobacco cooperative stabilization corporation because the corporation was not a State actor. Bailey v. Flue-Cured Tobacco Coop. Stabilization Corp., 158 N.C. App. 449, 581 S.E.2d 811, 2003 N.C. App. LEXIS 1179 (2003).

**Section 53-229, relating to the acquisition and control of certain nonbank banking institutions,** does not violate the commerce clause of the U.S. Constitution, nor the equal protection, exclusion emoluments and antimonopoly provisions of the State Constitution. Citicorp v. Currie, 75 N.C. App. 312, 330 S.E.2d 635, cert. denied and appeal dismissed, 314 N.C. 537, 314 N.C. 538, 335 S.E.2d 15, 335 S.E.2d 16, 335 S.E.2d 15, 335 S.E.2d 16 (1985).

**Cited** in Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971); North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976); In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979); In re DeLancy, 67 N.C. App. 647, 313 S.E.2d 880 (1984); State ex rel. Banking Comm'n v. Citicorp Sav. Indus. Bank, 74 N.C. App. 474, 328 S.E.2d 895 (1985); Coastal Neuro-Psychiatric Assocs. v. Onslow Mem. Hosp., 795 F.2d 340 (4th Cir. 1986); Jetstream Aero Servs., Inc. v. New Hanover County, 672 F. Supp. 879 (E.D.N.C. 1987); Empire Distribs. of N.C., Inc. v. Schieffelin & Co., 677 F. Supp. 847 (W.D.N.C. 1988); Nursing Registry, Inc. v. Eastern N.C. Regional Emergency Medical Servs. Consortium, Inc., 959 F. Supp. 298 (E.D.N.C. 1997).

## Sec. 35. Recurrence to fundamental principles.

A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty.

**History.** — The provisions of this section are similar to those of Art. I, § 29, Const. 1868.

**Legal Periodicals.** — For an essay, "On the Significance of Constitutional Spirit," see 70 N.C.L. Rev. 1803 (1992).

For article, "The Rising Tide of North Carolina Constitutional Protection in the New Millenium," see 27 Campbell L. Rev. 223 (2005).

### CASE NOTES

**Liberal Construction.** — The Constitution must be construed in the light of its history, and must be liberally construed in aid of progress, but a liberal construction is especially required in interpreting those provisions safeguarding individual liberty. State v. Harris, 216 N.C. 746, 6 S.E.2d 854, 128 A.L.R. 658 (1940), decided under Art. I, § 29, Const. 1868.

**Sovereign Immunity.** — Sovereign immunity was not available as a defense to the claims of temporary employees that were brought directly under the North Carolina Constitution against state agencies and employees. Sanders v. State Pers. Comm'n, 183 N.C. App. 15, 644 S.E.2d 10, 2007 N.C. App. LEXIS 845 (2007).

**Exhaustion of Other State Remedies Required.** — A state constitutional action is not proper under this section, unless no other state remedy is available; here, an existing state tort remedy precluded plaintiff's assault-based constitutional claim against an arresting officer. Glenn-Robinson v. Acker, 140 N.C. App. 606, 538 S.E.2d 601, 2000 N.C. App. LEXIS 1258 (2000).

**Relation to Declaratory Judgment Actions.** — Although the North Carolina Uniform Declaratory Judgment Act, G.S. 1-253 to 1-267, empowers a trial court to decline a request for declaratory relief under certain circumstances, G.S. 1-257 should not be applied to thwart a properly presented constitutional challenge; the North Carolina courts are obligated to protect fundamental rights when those rights are threatened and the North Carolina Constitution admonishes that a frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty. Therefore, where it clearly appears either that property or fundamental human rights are denied in violation of constitutional guarantees, and where a statutory provision is specifically challenged by a person directly affected by it, declaratory relief as to the constitutional validity of that provision is appropriate; in other words, when the requested declaration satisfies the recognized criteria, the trial court has no discretion to decline the request. Augur v. Augur, 356 N.C.

582, 573 S.E.2d 125, 2002 N.C. LEXIS 1262 (2002).

**For application of Art. I, § 29, Const. 1868,** see State v. Hardy, 189 N.C. 799, 128 S.E. 152 (1925).

**Town Ordinance Barring Sex Offenders from Parks.** — Woodfin, N.C., Ordinance § 130.03 was constitutional under the Fourteenth Amendment of the United States Constitution and N.C. Const., Art. I, §§ 19 and 35 as: (1) a sex offender's alleged liberty interest to enter a park owned by a town to have barbecues and enjoy nature was not protected by the right to intrastate travel; (2) an asserted liberty interest to freely roam in parks was not a fundamental right; (3) a town had been delegated the authority to prohibit acts detrimental to its citizens' health, safety, or welfare by G.S. 160A-174; (4) G.S. 14-208.5 recognized that sex offenders posed a high risk of engaging in sex offenses; and (5) Woodfin, N.C., Ordinance § 130.03 was rationally related to a legitimate government interest in protecting children and other visitors to parks owned and operated by the town from sexual attacks. Standley v. Town of Woodfin, 362 N.C. 328, 661 S.E.2d 728, 2008 N.C. LEXIS 496 (2008).

**North Carolina State Personnel Commission regulated employment scheme, which was meant to delineate state employees and their appointments, was constitutional** because the regulations did not exhibit a situation in which the North Carolina Legislature was interfering with an ordinary and simple occupation, nor was the employment scheme intended to be free from governmental regulation. Moreover, the regulations were rationally related to a substantial governmental interest, and nothing in the governmental action arbitrarily or irrationally limited temporary state employees' rights to earn a livelihood. Sanders v. State Personnel Comm'n, — N.C. App. —, 677 S.E.2d 182, 2009 N.C. App. LEXIS 687 (2009).

**Cited** in Corum v. University of N.C. ex rel. Bd. of Governors, 330 N.C. 761, 413 S.E.2d 276; Still v. Lance, 279 N.C. 254, 182 S.E.2d 403 (1971); In re Reddy, 16 N.C. App. 520, 192 S.E.2d 621 (1972); Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975); State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985); Treants Enters., Inc. v. Onslow County, 83 N.C. App. 345, 350 S.E.2d 365 (1986); Corum v. University of N.C., 97 N.C. App. 527, 389 S.E.2d 596 (1990); Boesche v. Raleigh-Durham Airport Auth., 111 N.C. App. 149, 432 S.E.2d 137 (1993); In re Allison, 143 N.C. App. 586, 547 S.E.2d 169, 2001 N.C. App. LEXIS 329 (2001); Seaton v. Owens, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 22298 (M.D.N.C. Dec. 8, 2003); Petroleum Traders Corp. v. State, 190 N.C. App. 542, 660 S.E.2d 662, 2008 N.C. App. LEXIS 1003 (2008).

## Sec. 36. Other rights of the people.

The enumeration of rights in this Article shall not be construed to impair or deny others retained by the people.

**History.** — The provisions of this section are similar to those of Art. I, § 38, Const. 1868, as amended in 1962.

**Legal Periodicals.** — For article, "The Rising Tide of North Carolina Constitutional Protection in the New Millenium," see 27 Campbell L. Rev. 223 (2005).

### CASE NOTES

**Exhaustion of Other State Remedies Required.** — A state constitutional action is not proper under this section, unless no other state remedy is available; here, an existing state tort remedy precluded plaintiff's assault-based constitutional claim against an arresting officer. Glenn-Robinson v. Acker, 140 N.C. App. 606, 538 S.E.2d 601, 2000 N.C. App. LEXIS 1258 (2000).

**Instruction Informing Jury of Death Penalty.** — Denial of defendant's written request for an instruction that "should you [the jury] return a verdict of guilty to the alleged crime of rape, the death penalty will be imposed by this Court" did not deny him his constitutional right of due process as guaranteed by U.S. Const., Amends. V and XIV and by N.C. Const., Art. I, §§ 19, 23 and this section, since the record revealed that each juror knew that the sentence of death would be imposed upon the return of a verdict of guilty. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

**An extension in the city council's term of office** neither violated petitioners' constitutional right to participate in the political process nor infringed upon the rights of voters. Crump v. Snead, 134 N.C. App. 353, 517 S.E.2d 384, 1999 N.C. App. LEXIS 760 (1999), cert. denied, 351 N.C. 101, 541 S.E.2d 143 (1999).

**No Constitutional Right to Erosion Control.** — Plaintiffs' claims that hardened structure rules, promulgated by defendants, effected a taking of property without just compensation and violated G.S. 113A-128 of the Coastal Area

Management Act were properly dismissed, because plaintiffs failed to cite any persuasive authority for the proposition that a littoral or riparian landowner has a right to erect hardened structures in statutorily designated areas of environmental concern to protect their property from erosion or migration. Shell Island Homeowners Ass'n v. Tomlinson, 134 N.C. App. 217, 517 S.E.2d 406 (1999).

**Cited** in In re Reddy, 16 N.C. App. 520, 192 S.E.2d 621 (1972); Boesche v. Raleigh-Durham Airport Auth., 111 N.C. App. 149, 432 S.E.2d 137 (1993); Midulla v. Howard A. Cain Co., Inc., 133 N.C. App. 306, 515 S.E.2d 244 (1999); State v. Price, — N.C. App. —, 611 S.E.2d 891 (2005).

## Sec. 37. Rights of victims of crime.

(1) *Basic rights.* Victims of crime, as prescribed by law, shall be entitled to the following basic rights:

(a) The right as prescribed by law to be informed of and to be present at court proceedings of the accused.

(b) The right to be heard at sentencing of the accused in a manner prescribed by law, and at other times as prescribed by law or deemed appropriate by the court.

(c) The right as prescribed by law to receive restitution.

(d) The right as prescribed by law to be given information about the crime, how the criminal justice system works, the rights of victims, and the availability of services for victims.

(e) The right as prescribed by law to receive information about the conviction or final disposition and sentence of the accused.

(f) The right as prescribed by law to receive notification of escape, release, proposed parole or pardon of the accused, or notice of a reprieve or commutation of the accused's sentence.

(g) The right as prescribed by law to present their views and concerns to the Governor or agency considering any action that could result in the release of the accused, prior to such action becoming effective.

(h) The right as prescribed by law to confer with the prosecution.

(2) *No money damages; other enforcement.* Nothing in this section shall be construed as creating a claim for money damages against the State, a county, a municipality, or any of the agencies, instrumentalities, or employees thereof. The General Assembly may provide for other remedies to ensure adequate enforcement of this section.

(3) *No ground for relief in criminal case.* The failure or inability of any person to provide a right or service provided under this section may not be used by a defendant in a criminal case, an inmate, or any other accused as a ground for relief in any trial, appeal, postconviction litigation, habeas corpus, civil action, or any similar criminal or civil proceeding. (1995, c. 438, s. 1.)

**Editor's Note.** — This section was submitted to the qualified voters of the State at the general election held in November 1996, and was approved by the voters at that election. Session Laws 1995, c. 438, s. 3, made this section effective upon certification of approval by the State Board of Elections to the Secretary of State; certification was made on November 26, 1996.

# ARTICLE II

# LEGISLATIVE

## Section 1. Legislative power.

The legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives.

**History.** — The provisions of this section are similar to those of Art. II, § 1, Const. 1868.

**Legal Periodicals.** — For note on delegation of legislative authority to individuals, see 31 N.C.L. Rev. 308 (1953).

For case law survey as to separation of powers, see 44 N.C.L. Rev. 947 (1966).

For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

For comment on sectarian education and the State, see 1980 Duke L.J. 801.

For survey of 1982 law relating to constitutional law, see 61 N.C.L. Rev. 1052 (1983).

## CASE NOTES

*Editor's Note. — Some of the cases cited below were decided under former Art. II, § 1, Const. 1868.*

**All legislative power in this State rests in the General Assembly** under this section, except as authorized by the Constitution, as in cases of municipal corporations. Redevelopment Comm'n v. Security Nat'l Bank, 252 N.C. 595, 114 S.E.2d 688 (1960).

Legislative power vests exclusively in the General Assembly, and except as authorized by the Constitution, as in case of municipal corporations, may not be delegated. State ex rel. Taylor v. Carolina Racing Ass'n, 241 N.C. 80, 84 S.E.2d 390 (1954); Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967).

**And the General Assembly Is Possessed of Full Legislative Powers.** — Under the North Carolina Constitution, the General Assembly, so far as that instrument is concerned, is possessed of full legislative powers unless restrained by express constitutional provision or necessary implication therefrom. Martin v. North Carolina Hous. Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

**To Legislate for Protection of Health, Safety, Morals and General Welfare.** — The General Assembly, exercising the police power of the State, may legislate for the protection of the public health, safety, morals and general welfare of the people. Martin v. North Carolina Hous. Corp., 277 N.C. 29, 175 S.E.2d 665 (1970); In re Denial of Approval to Issue Hous. Bonds, 307 N.C. 52, 296 S.E.2d 281 (1982).

**Questions of Public Policy Are for Legislative Determination.** — Absent constitutional restraint, questions as to public policy are for legislative determination. Martin v. North Carolina Hous. Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

**The wisdom of an enactment is a legislative and not a judicial question.** The General Assembly has the right to experiment with new modes of dealing with old evils, except as prevented by the Constitution. Martin v. North Carolina Hous. Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

**Only Legislature May Amend Statute.** — Only the General Assembly may amend or rewrite a statute. Ramsey v. North Carolina Veterans Comm'n, 261 N.C. 645, 135 S.E.2d 659 (1964).

**Legislature Cannot Restrict Power of Succeeding Legislature.** — An act of the General Assembly is legal unless the Constitution contains a prohibition against it. However, one legislature cannot restrict or limit by statute the right of a succeeding legislature to exercise its constitutional power to legislate in its own way. Plemmer v. Matthewson, 281 N.C. 722, 190 S.E.2d 204 (1971).

**Distinction between Delegating Power to Make Law and Conferring Authority as to Its Execution.** — There is a distinction generally recognized between a delegation of the power to make a law, which necessarily includes a discretion as to what it shall be, and the conferring of authority or discretion as to its execution. The first may not be done, whereas the latter, if adequate guiding standards are laid down, is permissible under certain circumstances. State v. Lisk, 21 N.C. App. 474, 204 S.E.2d 868, cert. denied, 285 N.C. 666, 207 S.E.2d 759 (1974).

Trial court did not err in granting summary judgment to the governor, state public safety agency, state highway patrol, and certain unidentified persons, and denying the wrecker service owner's motion for summary judgment on the wrecker service owner's declaratory judgment action seeking a determination that regulations used to remove his wrecker service business from the state's Wrecker Rotation Services List were illegal and that the regulations were preempted by federal law; the trial court had the authority to declare that the regulations were not illegal because the General Assembly granted to the state public safety agency the power to direct the state highway patrol to establish regulations for private wrecker services. Ramey v. Easley, 178 N.C. App. 197, 632 S.E.2d 178, 2006 N.C. App. LEXIS 1308 (2006).

**Legislative function cannot be delegated.** Cox v. City of Kinston, 217 N.C. 391, 8 S.E.2d 252 (1940).

**To Any Other Branch, Department or Agency.** — The legislature may not abdicate its power to make laws nor delegate its supreme legislative power to any other coordinate branch or to any agency which it may create. North Carolina Tpk. Auth. v. Pine Island, Inc., 265 N.C. 109, 143 S.E.2d 319 (1965); State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970); Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973); Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

This section inhibits the General Assembly from delegating its legislative powers to any other department or body. Jackson v. Guilford County Bd. of Adjustment, 2 N.C. App. 408, 163 S.E.2d 265 (1968).

**Not Even an Administrative Agency.** — The legislature may not delegate its power to make laws even to an administrative agency of the government. Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc., 285 N.C. 467, 206 S.E.2d 141 (1974).

**But the Legislature May Delegate Portion of Its Power Under Prescribed Standards.** — As to some specific subject matter, the legislature may delegate a limited portion of its legislative power to an administrative agency if it prescribes the standards under which the agency is to exercise the delegated powers. North Carolina Tpk. Auth. v. Pine Island, Inc., 265 N.C. 109, 143 S.E.2d 319 (1965); State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970); In re Willis, 288 N.C. 1, 215 S.E.2d 771 (1975), appeal dismissed, 423 U.S. 976, 96 S. Ct. 389, 46 L. Ed. 2d 300 (1976).

A modern legislature must be able to delegate, in proper instances, a limited portion of its legislative powers to administrative bodies which are equipped to adapt legislation to complex conditions involving numerous details with which the legislature cannot deal directly. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

**Although It Cannot Delegate Absolute Discretion to Apply or Withhold Application of Law.** — The legislature cannot vest in a subordinate agency the power to apply or withhold the application of the law in its absolute or unguided discretion. Carolina-Virginia Coastal Hwy. v. Coastal Tpk. Auth., 237 N.C. 52, 74 S.E.2d 310 (1953); Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973); Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc., 285 N.C. 467, 206 S.E.2d 141 (1974); State v. Lisk, 21 N.C. App. 474, 204 S.E.2d 868, cert. denied, 285 N.C. 666, 207 S.E.2d 759 (1974).

**Section Elucidates when Delegation Is Permissible.** — The effect of N.C. Const., Art. I, § 6 and this section is to elucidate the circumstances in which delegation of legislative powers is permissible. Heritage Village Church & Missionary Fellowship, Inc. v. State, 40 N.C. App. 429, 253 S.E.2d 473 (1979), aff'd, 299 N.C. 399, 263 S.E.2d 726 (1980).

**Legislature Must Declare Policy, Fix Legal Principles and Provide Adequate Standards.** — The legislative body must declare the policy of the law, fix legal principles which are to control in given cases, and provide adequate standards for the guidance of the administrative body or officer empowered to execute the law. Carolina-Virginia Coastal Hwy. v. Coastal Tpk. Auth., 237 N.C. 52, 74 S.E.2d 310 (1953); Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973); Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc., 285 N.C. 467, 206 S.E.2d 141 (1974); State v. Lisk, 21 N.C. App. 474, 204 S.E.2d 868, cert. denied, 285 N.C. 666, 207 S.E.2d 759 (1974); State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975), aff'd, 292 N.C. 147, 232 S.E.2d 698 (1977).

**Adequate Guiding Standards Are Required.** — The constitutional inhibition against delegating legislative authority does not preclude the legislature from transferring adjudicative and rule-making powers to administrative bodies provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The people, in this section, have conferred their legislative power upon the General Assembly, which may not transfer it to another officer or agency without the establishment of such standards for guidance as to retain in its own hands the supreme legislative power. Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

**Purpose of Adequate Guiding Standards Test.** — The purpose of the adequate guiding standards test is to reconcile the legislative need to delegate authority with the constitutional mandate that the legislature retain in its own hands the supreme legislative power. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

**Application of Adequate Guiding Standards Test.** — The key to an intelligent application of the adequate guiding standards test is an understanding that, while delegations of power to administrative agencies are necessary, such transfers of power should be closely monitored to insure that the decision-making by the agency is not arbitrary and unreasoned and that the agency is not asked to make important policy choices which might just as easily be made by the elected representatives in the legislature. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

**Determining Adequacy of Standards by Existence of Procedural Safeguards.** — In determining whether a particular delegation of authority is supported by adequate guiding standards, it is permissible to consider whether the authority vested in the agency is subject to procedural safeguards. A key purpose of the adequate guiding standards test is to insure that the decision-making by the agency is not arbitrary and unreasoned. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Procedural safeguards tend to encourage adherence to legislative standards by the agency to which power has been delegated. The presence or absence of procedural safeguards is relevant to the broader question of whether a delegation of authority is accompanied by adequate guiding standards. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

**Provision of Direction to Administrative Body with Expertise.** — When there is an obvious need for expertise in the achievement of legislative goals, the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation. It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

**Source of Standards.** — In the search for adequate guiding standards, the primary sources of legislative guidance are declarations by the General Assembly of the legislative goals and policies which an agency is to apply when exercising its delegated powers. Such declarations need be only as specific as the circumstances permit. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

**Standards for Board Regulating Trade or Profession.** — When the General Assembly delegates to administrative officers and agencies its own power to prescribe detailed administrative rules and regulations governing the right of individuals to engage in a trade or profession, the statute granting such authority must lay down or point to a standard for the guidance of the officer or agency in the exercise of his or its discretion. Otherwise, such statute will be deemed an unlawful delegation by the General Assembly of its own authority. Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

In licensing those who desire to engage in professions or occupations such as may be proper subjects of such regulation, the legislature may confer upon executive officers or bodies the power of granting or refusing to license persons to enter such trades or professions only when it has prescribed a sufficient standard for their guidance. Revco Southeast Drug Centers, Inc. v. North Carolina Bd. of Pharmacy, 21 N.C. App. 156, 204 S.E.2d 38 (1974); In re Willis, 288 N.C. 1, 215 S.E.2d 771 (1975), appeal dismissed, 423 U.S. 976, 96 S. Ct. 389, 46 L. Ed. 2d 300 (1976).

**Standards Are Unnecessary When Power Is Delegated in the Constitution.** — The principle that the General Assembly may not transfer its legislative power without the establishment of standards for guidance has no application to a direct delegation by the people, themselves, in the Constitution of this State, of any portion of their power, legislative or otherwise. In such case, the Supreme Court looks only to the Constitution to determine what power has been delegated. Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

**Administrative Details May Be Left to Agency.** — If it were necessary for the Turnpike Authority to formulate specific plans as to the course of the turnpike through the various municipalities, and as to the manner and method of construction, and then seek legislative approval thereof, there would be no purpose in creating the Authority; the legislature might just as well act itself in the entire matter. The prohibition against abdication of legislative power in favor of an agency was never intended to extend to such administrative details. North Carolina Tpk. Auth. v. Pine Island, Inc., 265 N.C. 109, 143 S.E.2d 319 (1965).

**Legislature May Delegate Power to Determine Facts.** — The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some facts or state of facts upon which the law makes, or intends to make, its own action depend. State v. Curtis, 230 N.C. 169, 52 S.E.2d 364 (1949).

The legislature may not abdicate its power to make laws or delegate its supreme legislative power to any other department or body. However, it is not necessary for the legislature to ascertain the facts of, or to deal with, each case. The constitutional inhibition against delegating legislative authority does not deny to the legislature the necessary flexibility of enabling it to lay down policies and establish standards, while leaving to designated governmental agencies and administrative boards the determination of facts to which the policy as declared by the legislature shall apply. Carolina-Virginia Coastal Hwy. v. Coastal Tpk. Auth., 237 N.C. 52, 74 S.E.2d 310 (1953); Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973); State v. Lisk, 21 N.C. App. 474, 204 S.E.2d 868, cert. denied, 285 N.C. 666, 207 S.E.2d 759 (1974); A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

The General Assembly, for the purpose of carrying its enactment into effect, may delegate the power to find facts or to determine the existence or nonexistence of a factual situation or condition on which the operation of a law is made to depend or another agency of the government is to come into existence, provided adequate standards are set forth to guide the agency in so doing. Redevelopment Comm'n v. Security Nat'l Bank, 252 N.C. 595, 114 S.E.2d 688 (1960); Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973); Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc., 285 N.C. 467, 206 S.E.2d 141 (1974); State v. Lisk, 21 N.C. App. 474, 204 S.E.2d 868, cert. denied, 285 N.C. 666, 207 S.E.2d 759 (1974).

The General Assembly, having itself declared the policy to be effectuated and having established the broad framework of law within which it is to be accomplished and standards for the guidance of the administrative agency, may delegate to such agency the authority to make determinations of fact upon which the application of a statute to particular situations will depend. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

**Delegation of Authority to Test Applicants to Bar.** — There is no more appropriate delegation of authority than that of testing to determine a capability to practice law. The Board of Law Examiners is not required to make important policy choices, which might just as easily be made by the elected representatives in the legislature, but merely to compile and administer examinations. Form, grading and logistics only are left to the Board, which does no violence to constitutional principle. Bowens v. Board of Law Exmrs., 57 N.C. App. 78, 291 S.E.2d 170 (1982).

**Delegation of Power to Private Corporations.** — The legislature may not vest in a private corporation the authority to determine in its absolute or unguided discretion the price at which another, with whom it has no contractual relation, may sell to a willing buyer an article lawfully acquired and owned by him. Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc., 285 N.C. 467, 206 S.E.2d 141 (1974).

The "nonsigner" provision of former G.S. 66-56, extending the force and effect of a "fair trade" contract to a seller not a party thereto, was unconstitutional, because it delegated legislative power to a private corporation, in violation of this section. Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc., 285 N.C. 467, 206 S.E.2d 141 (1974).

**Delegation of Power to Voters of Municipality.** — While an act, otherwise valid, may be enacted so as to take effect upon approval by a majority of the qualified voters of the affected locality, the General Assembly cannot constitutionally provide that the qualified voters in one governmental unit, e.g., a town, shall decide whether a statute shall be in force and effect elsewhere than in the territory comprising that particular governmental unit. State ex rel. Taylor v. Carolina Racing Ass'n, 241 N.C. 80, 84 S.E.2d 390 (1954).

An act, otherwise valid, may be enacted so as to take effect upon approval by a majority of the qualified voters of the affected locality. Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967).

**Delegation of Power to Board of Bar Examiners.** — This section does not unconstitutionally delegate legislative power, where the statute authorizes the Board of Law Examiners to make rules governing admission to the bar. Bring v. North Carolina State Bar, 348 N.C. 655, 501 S.E.2d 907 (1998).

**Incorporation of Municipal Corporations.** — Ordinarily no delegation of legislative functions is involved in general laws providing for the incorporation of municipal corporations, fixing the conditions on which they may be created, and leaving to some officer or official body the duty of determining whether such conditions exist. However if the statute requires or authorizes the court or other agency to pass upon questions of public policy involved, or to exercise any discretion as to whether the municipal corporation should be created, or to render any other assistance than the determination of facts, there is an attempted delegation of legislative power and the statute is invalid. Carolina-Virginia Coastal Hwy. v. Coastal Tpk. Auth., 237 N.C. 52, 74 S.E.2d 310 (1953).

**Power May Be Delegated to Municipalities.** — Ordinary restrictions with respect to the delegation of power to an agency of the State, which exercises no function of government, do not apply to cities, towns, or counties. Plemmer v. Matthewson, 281 N.C. 722, 190 S.E.2d 204 (1972).

Trial court's conclusion that a city council improperly circumvented an appeals process in exercising its legislative authority to amend the city's zoning map was erroneous because the enactment of zoning legislation within the limitations imposed by N.C. Const., Art. II, § 1 and the enabling statute was a matter within the legislative authority of the council; nonetheless, the council exceeded its legislative authority by considering a zoning map amendment application that was filed prior to the expiration of the four-month window mandated by Section 14.8 of the Ordinances, which began on the date the council made a final determination that the district would be zoned General Business. Carroll v. City of Kings Mt., — N.C. App. —, 666 S.E.2d 814, 2008 N.C. App. LEXIS 1745 (2008).

**And to Counties.** — The general rule that legislative power, vested in the General Assembly, may not be delegated is subject to an exception permitting the delegation to municipal corporations and to counties of power to legislate concerning local problems. Porter v. Suburban San. Serv., Inc., 283 N.C. 479, 196 S.E.2d 760 (1973).

**But the General Assembly cannot delegate to a city or county more extensive power than it possesses.** In re Ellis, 277 N.C. 419, 178 S.E.2d 77 (1970).

Though the law-making power can unquestionably create a municipal corporation and delegate legislative authority to it, it cannot clothe the creature with power to do what the Constitution prohibits the creator from doing. In re Ellis, 277 N.C. 419, 178 S.E.2d 77 (1970).

**The power to zone is the power originally vested in the General Assembly** to legislate with reference to the use which may be made of land and the structures which may be erected or located thereon. Keiger v. Winston-Salem Bd. of Adjustment, 278 N.C. 17, 178 S.E.2d 616 (1971).

Power to zone real property is vested in the General Assembly by this section. Chrismon v. Guilford County, 322 N.C. 611, 370 S.E.2d 579 (1988).

**And Is Subject to Constitutional Limitations on Interference with Property Rights.** — The power to zone rests originally in the General Assembly, but this power is subject to the constitutional limitation forbidding arbitrary and unduly discriminatory interference with the right of property owners. In re Ellis, 277 N.C. 419, 178 S.E.2d 77 (1970).

**Power to Adopt Zoning Ordinance May Be Conferred.** — The General Assembly, notwithstanding this section, may confer upon county boards of commissioners the power to adopt zoning ordinances otherwise valid. Jackson v. Guilford County Bd. of Adjustment, 275 N.C. 155, 166 S.E.2d 78 (1969).

**But a Municipality May Not Delegate Power to Zone to Board of Adjustment.** — The legislative body of a municipal corporation, in which the General Assembly has vested its power to zone, may not delegate the power to zone to the municipal board of adjustment. Keiger v. Winston-Salem Bd. of Adjustment, 278 N.C. 17, 178 S.E.2d 616 (1971).

**Power to Legislate Concerning Local Problems.** — The authority of the General Assembly to delegate to municipal corporations power to legislate concerning local problems, such as zoning, is an exception (established by custom in most, if not all, of the states) to the general rule that legislative powers, vested in the General Assembly by this section, may not be delegated by it. This exception to the doctrine of nondelegation is not limited to a delegation of such legislative authority to incorporated cities and towns, but extends, as to other types of local matters, to a like delegation to counties and other units established by the General Assembly for local government. Jackson v. Guilford County Bd. of Adjustment, 275 N.C. 155, 166 S.E.2d 78 (1969).

**Enlargement of Municipal Boundaries.** — There is no constitutional provision prohibiting the creation of a municipality by an act of the General Assembly. A fortiori, by a special act, it may constitutionally enlarge the boundaries of a town which it has created. It may also provide statutory procedures for extending the corporate limits of a municipality organized and existing under the laws of the State. Plemmer v. Matthewson, 281 N.C. 722, 190 S.E.2d 204 (1972).

The enlargement of municipal boundaries by the annexation of new territory, resulting in the extension of municipal corporate jurisdiction, is a legitimate subject of legislation. In the absence of constitutional restriction, the extent to which such legislation shall be enacted, both with respect to the terms and circumstances under which the annexation may be had, and the manner in which it may be made, rests entirely in the discretion of the legislature, and an act of annexation is valid which authorizes the annexation of territory without the consent of its inhabitants. Plemmer v. Matthewson, 281 N.C. 722, 190 S.E.2d 204 (1972).

In delegating to town commissioners the discretionary right to decide whether to enlarge corporate limits as specified in special act, Session Laws 1971, c. 801, the General Assembly did not delegate legislative authority in violation of N.C. Const., Art. I, § 6 or this section. Except for approval by the town's board of commissioners, the act was complete in every respect at the time of its ratification. The only discretion given the commissioners was to decide whether or not to annex the territory specified in the act. In authorizing the annexation, the General Assembly determined that the annexation was suitable and proper. Plemmer v. Matthewson, 281 N.C. 722, 190 S.E.2d 204 (1972).

**Establishment or Abolition of County Court.** — While the legislature may not delegate its power to make laws, it may delegate to local political subdivisions the power to find facts determinative of whether a particular law should become effective in the locality, and therefore it may delegate to county commissioners the power to establish a county court when necessary in the public interest, and, a fortiori it may also delegate to the county commissioners similar authority to abolish a county court established by the legislature. Efird v. Board of Comm'rs, 219 N.C. 96, 12 S.E.2d 889 (1941).

**Issuance of Special Use Permit.** — Where a municipal ordinance required the board of adjustment to issue a special use permit when it made certain affirmative findings specified in the ordinance, the board's determination of whether to issue a special use permit was not an unlawful exercise of legislative power. Kenan v. Board of Adjustment, 13 N.C. App. 688, 187 S.E.2d 496, cert. denied, 281 N.C. 314, 188 S.E.2d 897 (1972).

**Denial of Special Use Permit.** — Where petitioners produced competent, material and substantial prima facie evidence to show their compliance with four general conditions required to obtain a special use permit needed to construct a mobile home park, and where city council failed to make adequate findings of fact to support denial of the special use application, such action constituted an unlawful exercise of legislative power in violation of this section. Clark v. City of Asheboro, 136 N.C. App. 114, 524 S.E.2d 46, 1999 N.C. App. LEXIS 1397 (1999).

**Licensing of Dry Cleaners.** — Chapter 30 of the Public Laws of 1937, as amended by c. 337 of the Public Laws of 1939, providing for the licensing of those engaged in the business of dry cleaning by the commission set up in the act, was an unconstitutional delegation of legislative authority, in that the act failed to set up standards or provide reasonable limitations to guide the administrative board in admitting or excluding persons from the business, but left such power in unlimited discretion of the administrative board. State v. Harris, 216 N.C. 746, 6 S.E.2d 854, 128 A.L.R. 658 (1940).

**For case upholding the Urban Redevelopment Law,** see Horton v. Redevelopment Comm'n, 259 N.C. 605, 131 S.E.2d 464 (1963).

**For case upholding the former North Carolina Turnpike Authority Act,** see North Carolina Tpk. Auth. v. Pine Island, Inc., 265 N.C. 109, 143 S.E.2d 319 (1965).

**Section 97-31, authorizing the Industrial Commission to award compensation** for bodily disfigurement, is not void as a delegation of legislative authority. Baxter v. W.H. Arthur Co., 216 N.C. 276, 4 S.E.2d 621 (1939).

**Session Laws 1967, c. 1177, authorizing the State Education Assistance Authority to issue revenue bonds** and to use the proceeds therefrom for the making of loans to "residents of this State to enable them to obtain an education in an eligible institution," as set forth in G.S. 116-209.2, when supplemented by federal legislation, provides sufficient legislative standards whereby the Authority can determine to which students the loans should be made, since it is implicit in c. 1177 that all loans made from the bond proceeds shall be made in compliance with the standards of federal legislation which supplement the loan program of the Authority. State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970).

**For case upholding the validity of the former Hospital Facilities Finance Act** (former G.S. 131-138 et seq.), see Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

**For case holding that former § 90-57.1 was unconstitutional,** see Revco Southeast Drug Centers, Inc. v. North Carolina Bd. of Pharmacy, 21 N.C. App. 156, 204 S.E.2d 38 (1974).

**As to the adequacy of the legislative guidelines in § 90-88,** see State v. Lisk, 21 N.C. App. 474, 204 S.E.2d 868, cert. denied, 285 N.C. 666, 207 S.E.2d 759 (1974).

**The burden of proof provision of the Rules Governing Admission to the Practice of Law** provides for the orderly determination of an applicant's moral character, so the provision is within the legitimate rule-making power constitutionally delegated to the Board of Law Examiners in G.S. 84-24. In re Willis, 288 N.C. 1, 215 S.E.2d 771 (1975), appeal dismissed, 423 U.S. 976, 96 S. Ct. 389, 46 L. Ed. 2d 300 (1976).

**As to the constitutionality of Chapter 143, Article 7 (§ 143-117 et seq.),** see State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975), aff'd, 292 N.C. 147, 232 S.E.2d 698 (1977).

**The Coastal Area Management Act of 1974 (§ 113A-100 et seq.) properly delegates authority** to the Coastal Resources Commission to develop, adopt and amend State guidelines for the coastal area. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

**Discretion to Determine Whether Commissioners Should Be Elected or Appointed.** — Discretion provided by G.S. 156-81(a) and (i) to the clerks of superior court to determine whether drainage commissioners should be elected or appointed is an unconstitutional delegation of legislative powers. Northampton County Drainage Dist. Number One v. Bailey, 326 N.C. 742, 392 S.E.2d 352 (1990).

**Exchange of Land by Board of Education.** — There is nothing in the Constitution which prohibits a board of education from exchanging land which it owns for other land for school purposes. Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

**Delegation of Authority to Plan and Construct Interstate Highway.** — The delegation of authority to the North Carolina Department of Transportation and the Board of Transportation to plan and construct an interstate highway did not constitute an unlawful delegation of legislative authority to an administrative body, unrestrained by legislative standards or sufficient procedural safeguards or political accountability. Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North

Carolina Dep't of Transp., 46 N.C. App. 350, 265 S.E.2d 890 (1980).

**Rate Freeze Statute Proper Exercise of Legislative Power.** — Enactment of G.S. 62-133.6 was an exercise by the legislature of the power granted to it under the North Carolina Constitution to alter electricity rates for investor-owned utilities for the next five years while the utilities seek to comply with new air emission standards, and simply allows the legislature to preempt the North Carolina Utilities Commission's ability to compel a general rate case by freezing rates until 31 December 2007; the North Carolina Utilities Commission properly dismissed a complaint regarding rates and a petition to initiate a general rate proceeding filed against an energy corporation by a customers association. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 163 N.C. App. 46, 592 S.E.2d 221, 2004 N.C. App. LEXIS 253 (2004), cert. denied, 358 N.C. 739, — S.E.2d — (2004), cert. dismissed, 358 N.C. 739, 602 S.E.2d 682 (2004).

**Party Benefitting From Agency Action May Not Later Challenge It On Separation of Powers Grounds.** — As a taxpayer sought, received, and benefitted from a variance from G.S. 105-130.4(t)'s tax allocation formula, it could not challenge, on separation-of-powers grounds, orders of the augmented North Carolina Tax Review Board that granted the variance. Philip Morris USA, Inc. v. Tolson, 176 N.C. App. 509, 626 S.E.2d 853, 2006 N.C. App. LEXIS 536 (2006), cert. denied, appeal dismissed, 361 N.C. 356, 644 S.E.2d 231 (2007).

**Agency Did Not Violate Separation of Powers Doctrine.** — Augmented North Carolina Tax Review Board did not violate the separation of powers doctrine by creating a special tax allocation formula for a multi-state corporation, because in so doing, it only exercised the powers expressly reserved for it by the general assembly under G.S. 105-130.4(t). Philip Morris USA, Inc. v. Tolson, 176 N.C. App. 509, 626 S.E.2d 853, 2006 N.C. App. LEXIS 536 (2006), cert. denied, appeal dismissed, 361 N.C. 356, 644 S.E.2d 231 (2007).

**Because the General Assembly did not intend, in passing G.S. 105-113.4C, to retroactively limit the procedures and standard for review governing the question of diligent enforcement of an escrow statute,** a business court's order compelling arbitration does not violate the separation of powers doctrine in N.C. Const., Art. I, § 6; Art. II, §§ 1 and 20; and Art. IV, § 1. State v. Philip Morris USA, Inc., — N.C. App. —, 666 S.E.2d 783, 2008 N.C. App. LEXIS 1757 (2008).

**Applied** in In re Powers, 295 S.E.2d 589 (N.C. 1982); White v. Pate, 308 N.C. 759, 304 S.E.2d 199 (1983); Kerik v. Davidson County, 145 N.C. App. 222, 551 S.E.2d 186, 2001 N.C. App. LEXIS 671 (2001).

**Cited** in In re Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973); Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975); In re Ordinance of Annexation No. 1977-4, 296 N.C. 1, 249 S.E.2d 698 (1978); In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979); Reed v. Byrd, 41 N.C. App. 625, 255 S.E.2d 606 (1979); Wood v. City of Fayetteville, 43 N.C. App. 410, 259 S.E.2d 581 (1979); In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979); Harts Book Stores, Inc. v. City of Raleigh, 53 N.C. App. 753, 281 S.E.2d 761 (1981); State ex rel. Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79 (1982); State v. Gravette, 327 N.C. 114, 393 S.E.2d 856 (1990); Bethania Town Lot Comm. v. City of Winston-Salem, 348 N.C. 664, 502 S.E.2d 360 (1998).

### OPINIONS OF ATTORNEY GENERAL

**Delay of Rules by Review Commission.** — An act vesting in the Administrative Rules Review Commission (ARRC), a commission appointed by the General Assembly, the power to delay indefinitely the effective date of duly adopted agency rules which it deems in excess of statutory authority would likely be held to violate this section by vesting the ARRC with judicial powers reserved to the court and with supreme legislative powers reserved to the General Assembly. See opinion of Attorney General to Henson P. Barnes, President Pro Tempore, Senate, — N.C.A.G. — (February 25, 1991).

**Contingent Lottery Legislation Not Invalid Delegation of Legislative Power.** — A statute enacted by the General Assembly providing for a lottery, with the effectiveness contingent upon the results of a statewide referendum, is neither constitutionally forbidden nor invalid as a prohibited delegation of legislative power. See opinion of Attorney General to Honorable James S. Forrester, M.D., North Carolina Senate, 1999 N.C.A.G. 7 (3/2/99).

## Sec. 2. Number of Senators.

The Senate shall be composed of 50 Senators, biennially chosen by ballot.

**History.** — The provisions of this section are similar to those of Art. II, § 3, Const. 1868.

**Defeated Amendment Proposals.** — An amendment proposed by Session Laws 1981, c. 504, s. 1, and defeated at the election held June 29, 1982, would have provided that Senators be chosen quadrennially.

An amendment proposed by Session Laws 1985, c. 768, s. 11, and defeated at the primary election held on May 6, 1986, would have added "Except that there shall be no election in 1988, and elections shall be conducted in 1989 and biennially thereafter" at the end of the section.

## Sec. 3. Senate districts; apportionment of Senators.

The Senators shall be elected from districts. The General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the senate districts and the apportionment of Senators among those districts, subject to the following requirements:

(1) Each Senator shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each Senator represents being determined for this purpose by dividing the population of the district that he represents by the number of Senators apportioned to that district;

(2) Each senate district shall at all times consist of contiguous territory;

(3) No county shall be divided in the formation of a senate district;

(4) When established, the senate districts and the apportionment of Senators shall remain unaltered until the return of another decennial census of population taken by order of Congress.

**History.** — The provisions of this section are similar to those of Art. II, § 4, Const. 1868, as amended in 1872-1873 and in 1968.

**Cross References.** — As to apportionment of the Senate, see G.S. 120-1.

**Editor's Note.** — The United States Department of Justice, by letter dated July 12, 2002, withdrew its November 30, 1981 objection interposed under Section 5 of the Voting Rights Act of 1965 to the 1968 amendment (Session Laws 1967, c. 640) of this section. That amendment, approved by the voters, added subsection (3), which provides that no county shall be divided in the formation of a Senate district.

**Legal Periodicals.** — For article, "Political Gerrymandering After Davis v. Bandemer," see 9 Campbell L. Rev. 207 (1987).

For article, "Racial Gerrymandering and the Voting Rights Act in North Carolina," see 9 Campbell L. Rev. 255 (1987).

### CASE NOTES

**Reapportionment is a political question** and not a judicial one. Leonard v. Maxwell, 216 N.C. 89, 3 S.E.2d 316, appeal dismissed, 308 U.S. 516, 60 S. Ct. 175, 84 L. Ed. 439 (1939), decided under Art. II, § 4, Const. 1868, as amended in 1872-1873.

**The 1968 amendments to the Constitution of North Carolina** that prohibited the splitting of counties in apportioning General Assembly Senate and House districts are not severable; furthermore, these amendments have no force or effect, statewide, for purposes of application to the 60 counties not covered by Section 5 of the Voting Rights Act of 1965, once the Attorney General of the United States interposed objection under Section 5 of the Voting Rights Act. Cavanagh v. Brock, 577 F. Supp. 176 (E.D.N.C. 1983).

**For discussion of unconstitutional apportionment,** see Drum v. Seawell, 249 F. Supp. 877 (M.D.N.C. 1965), aff'd, 383 U.S. 831, 86 S. Ct. 1237, 16 L. Ed. 2d 298 (1966), decided under Art. II, § 4, Const. 1868, as amended in 1872-1873.

**Whole County Provisions.** — The People's insertion of a whole county requirement within their Constitution was not an historical accident. Rather, this provision was inserted by the People as an objective limitation upon the authority of incumbent legislators to redistrict and reapportion in a manner inconsistent with the importance that North Carolinians traditionally have placed upon their respective county units in terms of their relationship to State government. Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377, 2002 N.C. LEXIS 420 (2002).

The whole county provisions of N.C. Const., Art. II, §§ 3(3) and 5(3) are interpreted consistent with federal law and reconciled with equal protection requirements under the state Constitution by requiring the formation of single-member districts in North Carolina legislative redistricting plans. The boundaries of such single-member districts, however, may not cross county lines except as outlined in the court's opinion. Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377, 2002 N.C. LEXIS 420 (2002).

Redistricting plan violated the Whole County Provision in N.C. Const., Art. II, § 3(3) and N.C. Const., Art. II, § 5(3) where one of the counties in question lacked sufficient population to support a non-Voting Rights Act house district; thus, a voting district that included that county had to add population across a county line, but only to the extent necessary to comply with the one-person, one vote standard. Pender County v. Bartlett, 361 N.C. 491, 649 S.E.2d 364, 2007 N.C. LEXIS 816 (2007).

**Single and Multi-Member Voting Districts.** — Use of both single-member and multi-member districts within the same redistricting plan violates the equal protection clause of the state Constitution unless it is established that inclusion of multi-member districts advances a compelling state interest; hence the trial court would be directed on remand of action challenging 2001 legislative redistricting plans to afford the opportunity to establish, at an evidentiary hearing, that the use of such districts advances a compelling state interest within the context of a specific, proposed remedial plan. Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377, 2002 N.C. LEXIS 420 (2002).

While instructive as to how multi-member districts may be used compatibly with "one-person, one-vote" principles, N.C. Const., Art. II, §§ 3(3) and 5(3) are not affirmative constitutional mandates and do not authorize use of both single-member and multi-member districts in a manner violative of the fundamental right of each North Carolinian to substantially equal voting power. Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377, 2002 N.C. LEXIS 420 (2002).

**2001 Legislative Redistricting Plans.** — Because the General Assembly enacted its 2001 legislative redistricting plans (Session Laws 2001-458 and 2001-459) in violation of the whole county provisions of N.C. Const., Art. II, §§ 3(3) and 5(3), these plans are unconstitutional and are therefore void. Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377, 2002 N.C. LEXIS 420 (2002).

**2002 Legislative Redistricting Plans.** — The North Carolina legislature's 2002 revised redistricting plans were constitutionally deficient in numerous instances; the plans failed to attain strict compliance with the legal requirements set forth in Stephenson I and were unconstitutional. Stephenson v. Bartlett, 357 N.C. 301, 582 S.E.2d 247, 2003 N.C. LEXIS 745 (2003).

**Cited** in State ex rel. Martin v. Preston, 325 N.C. 438, 385 S.E.2d 473 (1989); Stephenson v. Bartlett, 358 N.C. 219, 595 S.E.2d 112 (2004); Blankenship v. Bartlett, 184 N.C. App. 327, 646 S.E.2d 584, 2007 N.C. App. LEXIS 1452 (2007).

## Sec. 4. Number of Representatives.

The House of Representatives shall be composed of 120 Representatives, biennially chosen by ballot.

**History.** — The provisions of this section are similar to those of Art. II, § 5, Const. 1868, as amended in 1872-1873, 1962 and 1968.

**Defeated Amendment Proposals.** — An amendment proposed by Session Laws 1981, c. 504, s. 1, and defeated at the election held June 29, 1982, would have provided that Representatives be chosen quadrennially.

An amendment proposed by Session Laws 1985, c. 768, s. 11, and defeated at the primary election held on May 6, 1986, would have added "Except that there shall be no election in 1988, and elections shall be conducted in 1989 and biennially thereafter" at the end of the section.

## Sec. 5. Representative districts; apportionment of Representatives.

The Representatives shall be elected from districts. The General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the representative districts and the apportionment of Representatives among those districts, subject to the following requirements:

(1) Each Representative shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each Representative represents being determined for this purpose by dividing the population of the district that he represents by the number of Representatives apportioned to that district;

(2) Each representative district shall at all times consist of contiguous territory;

(3) No county shall be divided in the formation of a representative district;

(4) When established, the representative districts and the apportionment of Representatives shall remain unaltered until the return of another decennial census of population taken by order of Congress.

**Cross References.** — As to House apportionment, see G.S. 120-2.

**Editor's Note.** — The United States Department of Justice, by letter dated July 12, 2002, withdrew its November 30, 1981 objection interposed under Section 5 of the Voting Rights Act of 1965 to the 1968 amendment (Session Laws 1967, c. 640) of this section. That amendment, approved by the voters, added subsection (3), which provides that no county shall be divided in the formation of a Representative district.

**History.** — The provisions of this section are similar to those of Art. II, § 6, Const. 1868, as amended in 1968.

**Legal Periodicals.** — For article, "Political Gerrymandering After Davis v. Bandemer," see 9 Campbell L. Rev. 207 (1987).

For article, "Racial Gerrymandering and the Voting Rights Act in North Carolina," see 9 Campbell L. Rev. 255 (1987).

## CASE NOTES

**The 1968 amendments to the Constitution of North Carolina** that prohibited the splitting of counties in apportioning General Assembly Senate and House districts are not severable; furthermore, these amendments have no force or effect, statewide, for purposes of application to the 60 counties not covered by Section 5 of the Voting Rights Act of 1965, once the Attorney General of the United States interposed objection under Section 5 of the Voting Rights Act. Cavanagh v. Brock, 577 F. Supp. 176 (E.D.N.C. 1983).

**Obligation of the State is to apportion as nearly equally as possible on a population based representation,** and even minor deviations must be free from any taint of arbitrariness or discrimination. Drum v. Seawell, 249 F. Supp. 877 (M.D.N.C. 1965), aff'd, 383 U.S. 831, 86 S. Ct. 1237, 16 L. Ed. 2d 298 (1966), decided under Art. II, §§ 5 and 6 Const. 1868, as amended.

**Statistical Tests Used in Evaluating State's Efforts at Equal Apportionment.** — The Supreme Court, while rejecting a rigid application of a mathematical formula, has laid down two statistical tests in evaluating the State's "honest and good faith effort to construct districts as nearly of equal population as is practicable." First, the minimum controlling percentage, i.e., the percentage of the State's population which resides in the least populous districts which can elect a majority of each House; and second, the population variance ratio, i.e., the ratio between the most populous district and the least populous district of the State. Drum v. Seawell, 249 F. Supp. 877 (M.D.N.C. 1965), aff'd, 383 U.S. 831, 86 S. Ct. 1237, 16 L. Ed. 2d 298 (1966), decided under Art. II, §§ 5 and 6 Const. 1868, as amended.

**Guide Lines to Assist Lower Courts in Implementing Constitutional Guarantees of Suffrage.** — The equal protection clause requires substantially equal representation for all citizens in a state in each of the two houses of a state bicameral legislature. This right may not be debased by weighing votes differently according to where a citizen happens to reside. Representation in state legislative bodies must be, as nearly as practicable, apportioned on districts of equal population, though mechanical exactness is not required. Political subdivisions may be recognized, but not at the cost of substantial equality among the several districts. Considerations of history, economic or other group interests or area alone do not justify substantial deviations from the equal population concept. Nor will the presence of large numbers of military and military related personnel justify the underrepresentation of an area. Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible. Drum v. Seawell, 249 F. Supp. 877 (M.D.N.C. 1965), aff'd, 383 U.S. 831, 86 S. Ct. 1237, 16 L. Ed. 2d 298 (1966), decided under Art. II, §§ 5 and 6 Const. 1868, as amended.

**Whole County Provisions.** — The People's insertion of a whole county requirement within their Constitution was not an historical accident. Rather, this provision was inserted by the People as an objective limitation upon the authority of incumbent legislators to redistrict and reapportion in a manner inconsistent with the importance that North Carolinians traditionally have placed upon their respective county units in terms of their relationship to State government. Stephenson v. Bartlett, 355

N.C. 354, 562 S.E.2d 377, 2002 N.C. LEXIS 420 (2002).

The whole county provisions of N.C. Const., Art. II, §§ 3(3) and 5(3) are interpreted consistent with federal law and reconciled with equal protection requirements under the state Constitution by requiring the formation of single-member districts in North Carolina legislative redistricting plans. The boundaries of such single-member districts, however, may not cross county lines except as outlined in the court's opinion. Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377, 2002 N.C. LEXIS 420 (2002).

Redistricting plan violated the Whole County Provision in N.C. Const., Art. II, § 3(3) and N.C. Const. art. II, § 5(3) where one of the counties in question lacked sufficient population to support a non-Voting Rights Act house district; thus, a voting district that included that county had to add population across a county line, but only to the extent necessary to comply with the one-person, one vote standard. Pender County v. Bartlett, 361 N.C. 491, 649 S.E.2d 364, 2007 N.C. LEXIS 816 (2007).

**Single and Multi-Member Voting Districts.** — Use of both single-member and multi-member districts within the same redistricting plan violates the equal protection clause of the state Constitution unless it is established that inclusion of multi-member districts advances a compelling state interest; hence the trial court would be directed on remand of action challenging 2001 legislative redistricting plans to afford the opportunity to establish, at an evidentiary hearing, that the use of such districts advances a compelling state interest within the context of a specific, proposed remedial plan. Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377, 2002 N.C. LEXIS 420 (2002).

While instructive as to how multi-member districts may be used compatibly with "one-person, one-vote" principles, N.C. Const., Art. II, §§ 3(3) and 5(3) are not affirmative constitutional mandates and do not authorize use of both single-member and multi-member districts in a manner violative of the fundamental right of each North Carolinian to substantially equal voting power. Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377, 2002 N.C. LEXIS 420 (2002).

**2001 Legislative Redistricting Plans.** — Because the General Assembly enacted its 2001 legislative redistricting plans (Session Laws 2001-458 and 2001-459) in violation of the whole county provisions of N.C. Const., Art. II, §§ 3(3) and 5(3), these plans are unconstitutional and are therefore void. Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377, 2002 N.C. LEXIS 420 (2002).

**2002 Legislative Redistricting Plans.** — The North Carolina legislature's 2002 revised redistricting plans were constitutionally deficient in numerous instances; the plans failed to attain strict compliance with the legal requirements set fort in Stephenson I and were unconstitutional. Stephenson v. Bartlett, 357 N.C. 301, 582 S.E.2d 247, 2003 N.C. LEXIS 745 (2003).

**Cited** in State ex rel. Martin v. Preston, 325 N.C. 438, 385 S.E.2d 473 (1989); Stephenson v. Bartlett, 358 N.C. 219, 595 S.E.2d 112 (2004); Blankenship v. Bartlett, 184 N.C. App. 327, 646 S.E.2d 584, 2007 N.C. App. LEXIS 1452 (2007).

## Sec. 6. Qualifications for Senator.

Each Senator, at the time of his election, shall be not less than 25 years of age, shall be a qualified voter of the State, and shall have resided in the State as a citizen for two years and in the district for which he is chosen for one year immediately preceding his election.

**History.** — The provisions of this section are similar to those of Art. II, § 7, Const. 1868.

### CASE NOTES

**Applied** in Stanley v. Retirement & Health Benefits Div., 66 N.C. App. 122, 310 S.E.2d 637 (1984).

**Cited** in Royal v. State, 153 N.C. App. 495, 570 S.E.2d 738, 2002 N.C. App. LEXIS 1167 (2002).

## Sec. 7. Qualifications for Representative.

Each Representative, at the time of his election, shall be a qualified voter of the State, and shall have resided in the district for which he is chosen for one year immediately preceding his election.

**History.** — The provisions of this section are similar to those of Art. II, § 8, Const. 1868, as amended in 1968.

### CASE NOTES

**Cited** in Royal v. State, 153 N.C. App. 495, 570 S.E.2d 738, 2002 N.C. App. LEXIS 1167 (2002).

### OPINIONS OF ATTORNEY GENERAL

**A person must be 21 years old by the date of the general election in order to be elected to the House of Representatives.** See opinion of Attorney General to Mr. William R. Gilkeson, Jr., Staff Attorney, Research Division, Legislative Services Office, North Carolina General Assembly, 1999 N.C. AG LEXIS 33 (11/3/99).

## Sec. 8. Elections.

The election for members of the General Assembly shall be held for the respective districts in 1972 and every two years thereafter, at the places and on the day prescribed by law.

**History.** — The provisions of this section are similar to those of Art. II, § 27, Const. 1868, as amended by the Convention of 1875 and in 1968.

**Defeated Amendment Proposals.** — An amendment proposed by Session Laws 1981, c. 504, s. 1, and defeated at the election held June 29, 1982, would have provided that elections be held every four years.

An amendment proposed by Session Laws 1985, c. 768, s. 1, and defeated at the primary election held on May 6, 1986, would have amended this section by deleting "1972 and every two years thereafter" and substituting "1986, and in 1989 and every two years thereafter."

## Sec. 9. Term of office.

The term of office of Senators and Representatives shall commence on the first day of January next after their election. (1981 (Reg. Sess., 1982), c. 1241, s. 1.)

**History.** — The provisions of this section are similar to those of Art. II, § 25, Const. 1868, as amended by the Convention of 1875.

**Editor's Note.** — Session Laws 1981 (Reg. Sess., 1982), c. 1241, s. 3, made the amendment effective upon certification and applicable to members of the General Assembly elected in the 1982 general election, so that their terms began on January 1, 1983.

## Sec. 10. Vacancies.

Every vacancy occurring in the membership of the General Assembly by reason of death, resignation, or other cause shall be filled in the manner prescribed by law.

**History.** — The provisions of this section are similar to those of Art. II, § 13, Const. 1868, as amended in 1952 and 1968.

## Sec. 11. Sessions.

(1) *Regular sessions.* The General Assembly shall meet in regular session in 1973 and every two years thereafter on the day prescribed by law. Neither house shall proceed upon public business unless a majority of all of its members are actually present.

(2) *Extra sessions on legislative call.* The President of the Senate and the Speaker of the House of Representatives shall convene the General Assembly in extra session by their joint proclamation upon receipt by the President of the Senate of written requests therefor signed by three-fifths of all the members of the Senate and upon receipt by the Speaker of the House of Representatives of written requests therefor signed by three-fifths of all the members of the House of Representatives. (1969, c. 1270, s. 1.)

**Cross References.** — As to the convening of the regular session of the Senate and House of Representatives, see G.S. 120-11.1.

**History.** — The provisions of subsection (1) of this section are similar to those of Art. II, § 2, Const. 1868, as amended in 1872-1873, by the Convention of 1875 and in 1956.

**Defeated Amendment Proposals.** — An amendment proposed by Session Laws 1985, c. 768, s. 12, and defeated at the primary election held on May 6, 1986, would have amended this section by substituting "1987, and in 1990 and every two years thereafter" for "1973 and every two years thereafter" in subsection (1).

### CASE NOTES

**Cited** in North Carolina State Bar v. DuMont, 304 N.C. 627, 286 S.E.2d 89 (1982); Newsome v. North Carolina State Bd. of Elections, 105 N.C. App. 499, 415 S.E.2d 201 (1992).

## Sec. 12. Oath of members.

Each member of the General Assembly, before taking his seat, shall take an oath or affirmation that he will support the Constitution and laws of the United States and the Constitution of the State of North Carolina, and will faithfully discharge his duty as a member of the Senate or House of Representatives.

**History.** — The provisions of this section are similar to those of Art. II, § 24, Const. 1868.

## Sec. 13. President of the Senate.

The Lieutenant Governor shall be President of the Senate and shall preside over the Senate, but shall have no vote unless the Senate is equally divided.

**History.** — The provisions of this section are similar to those of Art. II, § 19, Const. 1868.

## Sec. 14. Other officers of the Senate.

(1) *President Pro Tempore — succession to presidency.* The Senate shall elect from its membership a President Pro Tempore, who shall become President of the Senate upon the failure of the Lieutenant Governor-elect to qualify, or upon succession by the Lieutenant Governor to the office of Governor, or upon the death, resignation, or removal from office of the President of the Senate, and who shall serve until the expiration of his term of office as Senator.

(2) *President Pro Tempore — temporary succession.* During the physical or mental incapacity of the President of the Senate to perform the duties of his

office, or during the absence of the President of the Senate, the President Pro Tempore shall preside over the Senate.

(3) *Other officers.* The Senate shall elect its other officers.

**History.** — The provisions of this section are similar to those of Art. II, § 20, Const. 1868, as amended in 1962.

## Sec. 15. Officers of the House of Representatives.

The House of Representatives shall elect its Speaker and other officers.

**History.** — The provisions of this section are similar to those of Art. II, § 18, Const. 1868.

## Sec. 16. Compensation and allowances.

The members and officers of the General Assembly shall receive for their services the compensation and allowances prescribed by law. An increase in the compensation or allowances of members shall become effective at the beginning of the next regular session of the General Assembly following the session at which it was enacted.

**History.** — The provisions of this section are similar to those of Art. II, § 28, Const. 1868, as added by the Convention of 1875 and amended in 1928, 1950, 1956 and 1968.

## Sec. 17. Journals.

Each house shall keep a journal of its proceedings, which shall be printed and made public immediately after the adjournment of the General Assembly.

**History.** — The provisions of this section are similar to those of Art. II, § 16, Const. 1868.

## Sec. 18. Protests.

Any member of either house may dissent from and protest against any act or resolve which he may think injurious to the public or to any individual, and have the reasons of his dissent entered on the journal.

**History.** — The provisions of this section are similar to those of Art. II, § 17, Const. 1868.

## Sec. 19. Record votes.

Upon motion made in either house and seconded by one fifth of the members present, the yeas and nays upon any question shall be taken and entered upon the journal.

**History.** — The provisions of this section are similar to those of Art. II, § 26, Const. 1868.

## Sec. 20. Powers of the General Assembly.

Each house shall be judge of the qualifications and elections of its own members, shall sit upon its own adjournment from day to day, and shall prepare bills to be enacted into laws. The two houses may jointly adjourn to any future day or other place. Either house may, of its own motion, adjourn for a period not in excess of three days.

**History.** — The provisions of the first two sentences of this section are similar to those of Art. II, § 24, Const. 1868.

### CASE NOTES

**Effect of Section.** — This section withdraws from the consideration of the courts the question of title involved in a contest for a seat in the General Assembly. State ex rel. Alexander v. Pharr, 179 N.C. 699, 103 S.E. 8 (1920); State ex rel. Bouldin v. Davis, 197 N.C. 731, 150 S.E. 507 (1929), decided under Art. II, § 22, Const. 1868.

**Budget Process.** — The Constitution mandates a three-step process with respect to the State's budget: (1) N.C. Const., Art. III, § 5(3), directs that the "Governor shall prepare and recommend to the General Assembly a comprehensive budget . . . for the ensuing fiscal period"; (2) this Article vests in the General Assembly the power to enact a budget (one recommended by the Governor or one of its own making); and (3) after the General Assembly enacts a budget, N.C. Const., Art. III, § 5(3), then provides that the Governor shall administer the budget "as enacted by the General Assembly." In re Powers, 295 S.E.2d 589 (N.C. 1982).

**Because the General Assembly did not intend, in passing G.S. 105-113.4C, to retroactively limit the procedures and standard for review governing the question of diligent enforcement of an escrow statute,** a business court's order compelling arbitration does not violate the separation of powers doctrine in N.C. Const., Art. I, § 6; Art. II, §§ 1 and 20; and Art. IV, § 1. State v. Philip Morris USA, Inc., — N.C. App. —, 666 S.E.2d 783, 2008 N.C. App. LEXIS 1757 (2008).

**Cited** in Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820 (1981).

## Sec. 21. Style of the acts.

The style of the acts shall be: "The General Assembly of North Carolina enacts:".

**History.** — The provisions of this section are similar to those of Art. II, § 21, Const. 1868.

### CASE NOTES

**Placement of Enacting Clause.** — Article II, Section 21 of the state Constitution does not require the enacting clause "The General Assembly of North Carolina enacts:" to be included in the actual law as codified; rather, the enacting clause is generally included in the preamble to an act. Hence, where the Session Laws to each of the sections of Chapter 20 under which defendant was prosecuted contained the proper enacting clause language required by the Constitution, defendant's allegation that the court lacked subject matter jurisdiction over his case was without merit. State v. Phillips, 149 N.C. App. 310, 560 S.E.2d 852, 2002 N.C. App. LEXIS 185 (2002), appeal dismissed, 355 N.C. 499, 564 S.E.2d 230 (2002).

**Cited** in State v. Phillips, 152 N.C. App. 679, 568 S.E.2d 300, 2002 N.C. App. LEXIS 975 (2002).

## Sec. 22. Action on bills.

(1) *Bills subject to veto by Governor; override of veto.* Except as provided by subsections (2) through (6) of this section, all bills shall be read three times in each house and shall be signed by the presiding officer of each house before being presented to the Governor. If the Governor approves, the Governor shall sign it and it shall become a law; but if not, the Governor shall return it with objections, together with a veto message stating the reasons for such objections, to that house in which it shall have originated, which shall enter the

objections and veto message at large on its journal, and proceed to reconsider it. If after such reconsideration three-fifths of the members of that house present and voting shall agree to pass the bill, it shall be sent, together with the objections and veto message, to the other house, by which it shall likewise be reconsidered; and if approved by three-fifths of the members of that house present and voting, it shall become a law notwithstanding the objections of the Governor. In all such cases the votes of both houses shall be determined by yeas and nays, and the names of the members voting shall be entered on the journal of each house respectively.

(2) *Amendments to Constitution of North Carolina.* Every bill proposing a new or revised Constitution or an amendment or amendments to this Constitution or calling a convention of the people of this State, and containing no other matter, shall be submitted to the qualified voters of this State after it shall have been read three times in each house and signed by the presiding officers of both houses.

(3) *Amendments to Constitution of the United States.* Every bill approving an amendment to the Constitution of the United States, or applying for a convention to propose amendments to the Constitution of the United States, and containing no other matter, shall be read three times in each house before it becomes law, and shall be signed by the presiding officers of both houses.

(4) *Joint resolutions.* Every joint resolution shall be read three times in each house before it becomes effective and shall be signed by the presiding officers of both houses.

(5) *Other exceptions.* Every bill:

(a) In which the General Assembly makes an appointment or appointments to public office and which contains no other matter;

(b) Revising the senate districts and the apportionment of Senators among those districts and containing no other matter;

(c) Revising the representative districts and the apportionment of Representatives among those districts and containing no other matter; or

(d) Revising the districts for the election of members of the House of Representatives of the Congress of the United States and the apportionment of Representatives among those districts and containing no other matter,

shall be read three times in each house before it becomes law and shall be signed by the presiding officers of both houses.

(6) *Local bills.* Every bill that applies in fewer than 15 counties shall be read three times in each house before it becomes law and shall be signed by the presiding officers of both houses. The exemption from veto by the Governor provided in this subsection does not apply if the bill, at the time it is signed by the presiding officers:

(a) Would extend the application of a law signed by the presiding officers during that two year term of the General Assembly so that the law would apply in more than half the counties in the State, or

(b) Would enact a law identical in effect to another law or laws signed by the presiding officers during that two year term of the General Assembly that the result of those laws taken together would be a law applying in more than half the counties in the State.

Notwithstanding any other language in this subsection, the exemption from veto provided by this subsection does not apply to any bill to enact a general law classified by population or other criteria, or to any bill that contains an appropriation from the State treasury.

(7) *Time for action by Governor; reconvening of session.* If any bill shall not be returned by the Governor within 10 days after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the General Assembly shall have adjourned:

(a) For more than 30 days jointly as provided under Section 20 of Article II of this Constitution; or

(b) Sine die

in which case it shall become a law unless, within 30 days after such adjournment, it is returned by the Governor with objections and veto message to that house in which it shall have originated. When the General Assembly has adjourned sine die or for more than 30 days jointly as provided under Section 20 of Article II of this Constitution, the Governor shall reconvene that session as provided by Section 5(11) of Article III of this Constitution for reconsideration of the bill, and if the Governor does not reconvene the session, the bill shall become law on the fortieth day after such adjournment. Notwithstanding the previous sentence, if the Governor prior to reconvening the session receives written requests dated no earlier than 30 days after such adjournment, signed by a majority of the members of each house that a reconvened session to reconsider vetoed legislation is unnecessary, the Governor shall not reconvene the session for that purpose and any legislation vetoed in accordance with this section after adjournment shall not become law.

(8) *Return of bills after adjournment.* For purposes of return of bills not approved by the Governor, each house shall designate an officer to receive returned bills during its adjournment. (1995, c. 5, s. 1.)

**History.** — The provisions of this section are similar to those of Art. II, § 23, Const. 1868.

**Editor's Note.** — The amendments to this section by Session Laws 1995, c. 5, s. 1, were submitted to the qualified voters of the State at the general election held in November 1996, and approved by the voters at that election. Session Laws 1995, c. 5, s. 4, made this section effective January 1, 1997 upon certification; certification was made on November 26, 1996.

## CASE NOTES

*Editor's Note. — The cases cited below were decided under former Art. II, § 23, Const. 1868.*

**The judicial power cannot be exercised in aid of an unfinished and inoperative act,** so left upon the final adjournment, any more than in obstructing legislative action. State ex rel. Scarborough v. Robinson, 81 N.C. 409 (1879).

**Necessity for Signatures of Presiding Officers.** — The signatures of the presiding officers, by the Constitution, must be affixed to an act of legislation during the session of the General Assembly, and such signatures are necessary to its completeness and efficacy. State ex rel. Scarborough v. Robinson, 81 N.C. 409 (1879).

**Where an office was created by an act which was not signed** by the presiding officers until three days later, an election in the interim to fill such office was void. State ex rel. Cook v. Meares, 116 N.C. 582, 21 S.E. 973 (1895).

**Absent the signature, journals are not competent to prove compliance** with this section. Frazier v. Board of Comm'rs, 194 N.C. 49, 138 S.E. 433 (1927).

**Ratification Certificates Are Conclusive as to Compliance.** — The ratification certificates signed by the President of the Senate and the Speaker of the House are conclusive of the fact that the bill was read three times and was passed three times in each house of the General Assembly. State ex rel. Dyer v. City of Leaksville, 275 N.C. 41, 165 S.E.2d 201 (1969).

When an act is certified to by the speakers as having been ratified, it is conclusive of the fact that it was read three several times in each house and ratified. Union Bank v. Commissioners of Oxford, 119 N.C. 214, 25 S.E. 966 (1896).

The signature is conclusive of passage according to this section. Frazier v. Board of Comm'rs, 194 N.C. 49, 138 S.E. 433 (1927).

**And the journals of the House and Senate are not competent to contradict the certificates** of the presiding officers that a bill was duly read in each house three times and passed on each reading. State ex rel. Dyer v. City of Leaksville, 275 N.C. 41, 165 S.E.2d 201 (1969).

The journals are not admissible to contradict such signature. Frazier v. Board of Comm'rs, 194 N.C. 49, 138 S.E. 433 (1927).

**Proof of Compliance with N.C. Const., Art. II, § 23.** — The certificate is not sufficient to show that the bill was passed in compliance with N.C. Const., Art. II, § 23. Frazier v. Board of Comm'rs, 194 N.C. 49, 138 S.E. 433 (1927).

The usual certificate of ratification is conclusive only of the fact of ratification, but not of a compliance with N.C. Const., Art. II, § 23.

Smathers v. Commissioners of Madison County, 125 N.C. 480, 34 S.E. 554 (1899); Commissioners of New Hanover County v. DeRosset, 129 N.C. 275, 40 S.E. 43 (1901).

The additional steps necessary to show the passage of revenue acts are not within the conclusive presumption arising from the certificates of the presiding officers. The journals are made the exclusive sources of such proof. State ex rel. Dyer v. City of Leaksville, 275 N.C. 41, 165 S.E.2d 201 (1969).

With respect to the requirements in N.C. Const., Art. II, § 23, the House and Senate journals, and not the certificates of ratification signed by the presiding officers, are the sources of proof as to whether the bill was read on three several days in each house of the General Assembly and passed three several readings on three different days and that the yeas and nays on the second and third readings were entered on the journals. State ex rel. Dyer v. City of Leaksville, 275 N.C. 41, 165 S.E.2d 201 (1969).

## Sec. 23. Revenue bills.

No law shall be enacted to raise money on the credit of the State, or to pledge the faith of the State directly or indirectly for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities, or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days, and shall have been agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal.

**History.** — The provisions of this section are similar to those of Art. II, § 14, Const. 1868.

### CASE NOTES

I. General Consideration.
II. Journals and Certificates.
III. Substitutions and Amendments.

### I. GENERAL CONSIDERATION.

***Editor's Note.*** *— The cases cited below were decided under former Art. II, § 14, Const. 1868.*

**This section is mandatory.** Union Bank v. Commissioners of Oxford, 119 N.C. 214, 25 S.E. 966 (1896); Commissioners of Stanly County v. Snuggs, 121 N.C. 394, 28 S.E. 539 (1897).

**And must be strictly complied with.** Smathers v. Commissioners of Madison County, 125 N.C. 480, 34 S.E. 554 (1899).

**This section is not retroactive.** Board of Comm'rs v. Travelers' Ins. Co., 128 F. 817 (4th Cir. 1904).

**Effect of Section.** — The adoption of this section annulled all special powers remaining unexecuted, and not granted in strict conformity with its requirements. Commissioners of Buncombe County v. Payne, 123 N.C. 432, 31 S.E. 711 (1898).

**Article II, § 14 of the 1868 Constitution is substantially the same as this section.** North Carolina E. Mun. Power v. Wake County, 100 N.C. App. 693, 398 S.E.2d 486 (1990), cert. denied, 329 N.C. 270, 407 S.E.2d 838 (1991).

**Act Is Void Unless Section Is Followed.** — An act not passed with the formalities required by this section is void, and confers no authority upon a city to create a debt and issue the bonds therein provided for. City of Charlotte v. E.D. Shepard & Co., 122 N.C. 602, 29 S.E. 842 (1898); Glenn v. Wray, 126 N.C. 730, 36 S.E. 167 (1900); Cottrell v. Town of Lenoir, 173 N.C. 138, 91 S.E. 827 (1917).

**Valid and Invalid Acts Not Construed Together.** — An act passed according to the requirements of this section cannot be construed with an act not so passed. Pritchard v. Board of Comm'rs, 160 N.C. 476, 76 S.E. 488 (1912).

**Burden of Proof.** — Objecting parties have the burden of showing that acts had not been passed according to the requirements of this section. Slocomb v. City of Fayetteville, 125 N.C. 362, 34 S.E. 436 (1899).

**A motion to reconsider violates the efficacy of the original passage** according to this section; for the act to be valid, the final result must comply with this section. Allen v. City of Raleigh, 181 N.C. 453, 107 S.E. 463 (1921).

**Applicability of This Section to Statutes Imposing a Tax.** — It is well established law in this State that when determining the constitutional validity of a statute, if the meaning is clear from reading the words of the Constitution, courts should not search for a meaning elsewhere. The language of this section is clear in that it applies to statutes enacted to impose a tax. North Carolina E. Mun. Power v. Wake County, 100 N.C. App. 693, 398 S.E.2d 486 (1990), cert. denied, 329 N.C. 270, 407 S.E.2d 838 (1991).

Trial court erred in denying state agencies' motion to dismiss a corporation's complaint, seeking a declaratory judgment that an E-Procurement fee was a tax not enacted by the legislature in violation of N.C. Const., Art. II, § 23 and a refund of the taxes under G.S. 105-267 because the corporation's claims were barred by the defense of sovereign immunity; the North Carolina Supreme Court's holding that sovereign immunity could not prevent a plaintiff from asserting a claim alleging a violation of his rights under the Declaration of Rights of the North Carolina Constitution was limited to alleged violations of personal rights and did not extend to the corporation's complaint because N.C. Const., Art. II, § 23 did not articulate any rights, only procedures to be followed. Petroleum Traders Corp. v. State, 190 N.C. App. 542, 660 S.E.2d 662, 2008 N.C. App. LEXIS 1003 (2008).

**Inapplicability to Session Laws 1987 (Reg. Sess., 1988), Chapter 1052.** — There is no doubt that the effect of Chapter 1052 of Session Laws 1987 (Reg. Sess., 1988) imposed a greater tax burden on plaintiff for 1988. However, this section focuses on the purpose of the statute (to impose a tax) and not the result of the statute (an increased tax burden). Chapter 1052 of Session Laws 1987 (Reg. Sess., 1988) neither imposes a tax nor authorizes its imposition, and therefore, this section does not apply. North Carolina E. Mun. Power v. Wake County, 100 N.C. App. 693, 398 S.E.2d 486 (1990), cert. denied, 329 N.C. 270, 407 S.E.2d 838 (1991).

**If an act is not a revenue or tax act from the outset, it does not matter if the act is retroactive** or prospective in its application. North Carolina E. Mun. Power v. Wake County, 100 N.C. App. 693, 398 S.E.2d 486 (1990), cert. denied, 329 N.C. 270, 407 S.E.2d 838 (1991).

**Applicability to Townships.** — The restrictions are by necessary implication applicable to townships, as they are but constituent parts of the county organization. Wittkowsky v. Board of Comm'rs, 150 N.C. 90, 63 S.E. 275 (1908); Township Rd. Comm'n v. Board of Comm'rs, 178 N.C. 61, 100 S.E. 122 (1919).

**Where a town charter is not passed in accordance with this section,** such town cannot levy any tax under said charter, but it may levy taxes for necessary expense. Rodman-Heath Cotton Mills v. Town of Waxhaw, 130 N.C. 293, 41 S.E. 488 (1902).

**Section Not Applicable to Necessary County Expense.** — It is not necessary to enter the yeas and nays on an act to raise revenue for a necessary county expense. Black v. Commissioners of Buncombe County, 129 N.C. 121, 39 S.E. 818 (1901).

**Issuing bonds for road purposes is a necessary expense** to which the section does not apply. Leonard v. Board of Comm'rs, 185 N.C. 527, 117 S.E. 580 (1923). See Woodall v. Western Wake Hwy. Comm'n, 176 N.C. 377, 97 S.E. 226 (1918).

**An act authorizing treasurer to deliver State bonds** is not within this section. Battle v. Lacy, 150 N.C. 573, 64 S.E. 505 (1909).

**Effect on Bonds of Failure to Comply with Section.** — This section is mandatory, and, not having been complied with in the passage of certain laws authorizing certain counties to subscribe for stock in a railroad company and issue bonds in payment therefor, bonds issued by a city pursuant thereto were void. Burlingham v. City of New Bern, 213 F. 1014 (E.D.N.C. 1914).

A town may not pledge its faith or credit for the issuance of bonds for municipal purposes, unless under statutory authority is given in conformity with the requirements of this section, or unless for necessary expenses. Storm v. Town of Wrightsville Beach, 189 N.C. 679, 128 S.E. 17 (1925).

**An act of the legislature authorizing a bond issue for public roads** is valid if conforming to this section of the State Constitution, without submitting the proposition to a vote of the people. Hargrave v. Board of Comm'rs, 168 N.C. 626, 84 S.E. 1044 (1915).

**Payment of interest does not preclude inquiry as to the validity of the bonds.** Glenn v. Wray, 126 N.C. 730, 36 S.E. 167 (1900).

**Township Not Estopped to Deny Invalidity of Bonds.** — Where township bonds are invalid because issued without authority, the township is not estopped from asserting such fact by recitals in the bonds that they are issued in compliance with the Constitution and laws of the State. Debnam v. Chitty, 131 N.C. 657, 43 S.E. 3 (1902), overruled on other grounds, Board of Comm'rs v. Wachovia Loan & Trust Co., 143 N.C. 110, 55 S.E. 442 (1906).

**Who May Enjoin Bond Issue.** — It is competent for a taxpayer to file a complaint on behalf of himself and all other taxpayers in the State to enjoin the issue of State bonds under an unconstitutional act of Assembly. Galloway v. Jenkins, 63 N.C. 147 (1869).

**Changing of County Tax Agencies.** — The legislature has the power and authority to change the county tax agencies without further observing the requirements of this section. State ex rel. O'Neal v. Jennette, 190 N.C. 96, 129 S.E. 184 (1925).

**Tolls and Taxes Distinguished.** — Taxes are levied for the support of government, and their amount is regulated by its necessities. Tolls are compensation for the use of another's property or for improvements which have been made, and their amount is determined by the cost of the property or improvements. North Carolina Tpk. Auth. v. Pine Island, Inc., 265 N.C. 109, 143 S.E.2d 319 (1965).

Tolls are not taxes. A person uses a toll road at his option; if he does not use it, he pays no toll. North Carolina Tpk. Auth. v. Pine Island, Inc., 265 N.C. 109, 143 S.E.2d 319 (1965).

**Turnpike Authority Bonds Not Debt within Meaning of Constitution.** — The General Assembly has taken great care to make it crystal clear that the credit of neither the State nor any of its political subdivisions can be pledged to pay the Turnpike Authority's revenue bonds. This method of financing creates no debt within the meaning of the Constitution. North Carolina Tpk. Auth. v. Pine Island, Inc., 265 N.C. 109, 143 S.E.2d 319 (1965).

**A statute for the revaluation of property** is not in its strict sense a revenue act within the meaning of this section. Hart v. Board of Comm'rs, 192 N.C. 161, 134 S.E. 403 (1926).

**The filing fee required by the primary law** is in no sense a tax within the meaning of this section. McLean v. Durham County Bd. of Elections, 222 N.C. 6, 21 S.E.2d 842 (1942).

**A bailment surcharge imposed on each case of distilled spirits** shipped from ABC warehouse to ABC stores is not a tax; the cost of liquor enforcement is a burden incident to the privilege of buying spirituous liquors in the state and such a surcharge is not unconstitutional as a tax imposed in violation of this section or of N.C. Const., Art. V, § 2. North Carolina Ass'n of ABC Bds. v. Hunt, 76 N.C. App. 290, 332 S.E.2d 693, cert. denied, 314 N.C. 667, 336 S.E.2d 400 (1985).

**North Carolina State Lottery Act, G.S. 18C-101 et seq., was not a revenue bill** and, thus, it did not have to be enacted according to the requirements set forth in N.C. Const., Art. II, § 23. The law was not a revenue bill because it was not enacted to (1) raise money on the credit of the State, (2) pledge the faith of the State directly or indirectly for the payment of any debt, or (3) impose any tax upon the people of the State, but, rather, involved a voluntary activity that incidentally raised revenue. Heatherly v. State, 189 N.C. App. 213, 658 S.E.2d 11, 2008 N.C. App. LEXIS 530 (2008).

**Acts Upheld.** — Passage of Session Laws 1961, c. 783, amending G.S. 105-228.5, was held to meet the requirements of this section. Great Am. Ins. Co. v. High, 264 N.C. 752, 142 S.E.2d 681 (1965).

Session Laws 1967, c. 967, was duly passed and is valid and binding. State ex rel. Dyer v. City of Leaksville, 275 N.C. 41, 165 S.E.2d 201 (1969).

For case holding that the last paragraph of former G.S. 153-152 was enacted in accordance with the requirements of this section, see Martin v. Board of Comm'rs, 208 N.C. 354, 180 S.E. 777 (1935).

## II. JOURNALS AND CERTIFICATES.

**What Journals Must Show.** — The journal must show who voted for the bill, and that the requisite number of Senators and members did so, and no other source of evidence can be invoked; the certificate of the presiding officers that a bill has been read three times does not obviate the necessity of examining the journal. Burlingham v. City of New Bern, 213 F. 1014 (E.D.N.C. 1914).

**Showing of Nays.** — As this section requires that on the voting of a bill before the legislature the yeas and nays shall be entered on the journals, either the nays must be on the journal, or it must affirmatively appear that there were none. Commissioners of New Hanover County v. DeRosset, 129 N.C. 275, 40 S.E. 43 (1901).

Where the House journal showed that a certain law, authorizing the issuance of county bonds, was passed by the following vote: "Ayes 94, nays . . .; total . . .", such record sufficiently showed that there was no negative vote cast, under the presumption that the Clerk of the House charged with the recording of the vote performed his duty, and hence such record constituted a sufficient compliance with this section. Board of Comm'rs v. Tollman, 145 F. 753 (4th Cir. 1906).

A bill to authorize a county to pledge its faith and credit by issuing bonds for road purposes, duly ratified, was not invalid for failure to meet the requirements of this section, by reason of the failure to record on the journal on the second reading in one of the branches of the legislature the "no" vote, when it was made to appear from the entries of the names of those voting in the affirmative that a majority of the voters had so voted, the absence of the entries of the names of those voting in the negative showing that there were none. Leonard v. Board of Comm'rs, 185 N.C. 527, 117 S.E. 580 (1923), citing Board of Comm'rs v. Trust Co., 143 N.C. 110, 55 S.E. 442 (1906).

**Journals Conclusive.** — The journals of the General Assembly, when competent as evidence, import absolute verity, and cannot be explained or altered by parol evidence. Wilson v. Markley, 133 N.C. 616, 45 S.E. 1023 (1903).

The journals are the sole evidence as to whether the ayes and noes on a vote on a bill were entered on such journals. Commissioners of New Hanover County v. De Rosset, 129 N.C. 275, 40 S.E. 43 (1901); Allen v. City of Raleigh, 181 N.C. 453, 107 S.E. 463 (1921).

The journals are conclusive as against not only a printed statute published by authority of law, but also against a duly enrolled act. Union Bank v. Commissioners of Oxford, 119 N.C. 214, 25 S.E. 966 (1896); Commissioners of Stanly County v. Snuggs, 121 N.C. 394, 28 S.E. 539 (1897).

The Constitution requires that it should appear, not from the entries on the original bill, but from the journal, that the bill was properly read and the necessary entry of yeas and nays was made. If the journal should show that the bill was properly passed, no evidence will be received to contradict what is therein recorded. State ex rel. Dyer v. City of Leaksville, 275 N.C. 41, 165 S.E.2d 201 (1969).

**And Not the Certificates.** — With respect to the requirements in this section, the House and Senate journals, and not the certificates of ratification signed by the presiding officers, are the sources of proof as to whether the bill was read on three several days in each house of the General Assembly and passed three several readings on three different days and that the yeas and nays on the second and third readings were entered on the journals. State ex rel. Dyer v. City of Leaksville, 275 N.C. 41, 165 S.E.2d 201 (1969).

The additional steps necessary to show the passage of revenue acts are not within the conclusive presumption arising from the certificates of the presiding officers. The journals are made the exclusive sources of such proof. State ex rel. Dyer v. City of Leaksville, 275 N.C. 41, 165 S.E.2d 201 (1969).

**Effect of Certificates of Ratification.** — The usual certificate of ratification is conclusive only of the fact of ratification, but not of a compliance with this section of the Constitution. Smathers v. Commissioners of Madison County, 125 N.C. 480, 34 S.E. 554 (1899).

The certificate of the speakers of each house of the legislature is conclusive evidence that a bill was read and passed three several readings in each house. Commissioners of New Hanover County v. DeRossett, 129 N.C. 275, 40 S.E. 43 (1901).

**Correction of Journals.** — A subsequent special session of the same legislature may correct its journals of the regular session so as to show in point of fact that a bill of this character was properly passed in accordance with these provisions. Commissioners of Richmond County v. Farmers Bank, 152 N.C. 387, 67 S.E. 969 (1910).

**Where journal of the Senate affirmatively showed that first and second readings took place on the same day,** the act was unconstitutional. Storm v. Town of Wrightsville Beach, 189 N.C. 679, 128 S.E. 17 (1925).

### III. SUBSTITUTIONS AND AMENDMENTS.

**When Amendment Will Affect Constitutionality.** — An act passed in accordance with this section is not rendered invalid by an amendment not passed in accordance with the constitutional provision when the amendment does not affect the taxing or other financial features of the act, increase either the taxes, or impose any additional burden on the taxpayer. Wagstaff v. Central Hwy. Comm'n, 174 N.C. 377, 93 S.E. 908 (1917).

**Passage of Material Amendments.** — A material amendment made by one branch of the legislature to a bill passed by the other, allowing a county to pledge its credit in issuing bonds for the improvement of the highways therein, must be concurred in according to the requirements of this section. Glenn v. Wray, 126 N.C. 730, 36 S.E. 167 (1900); Claywell v. Board of Comm'rs, 173 N.C. 657, 92 S.E. 481 (1917). See also, Guire v. Board of Comm'rs, 177 N.C. 516, 99 S.E. 430 (1919), as to amendment by separate act.

**Passage of Immaterial Amendments.** — When an act has been passed in accordance with this section, an amendment which does not increase the amount of the bonds or the taxes to be levied or otherwise materially change the original bill may be adopted by the concurrence of both houses of the General Assembly. Board of Comm'rs v. F.M. Stafford & Co., 138 N.C. 453, 50 S.E. 862 (1905).

An amendment which does not increase the amount of the bonds or tax to be levied, or otherwise materially change the bill is immaterial. Gregg v. Board of Comm'rs, 162 N.C. 479, 78 S.E. 301 (1913).

**It is only when a material amendment is affected that rereading is necessary.** Frazier v. Board of Comm'rs, 194 N.C. 49, 138 S.E. 433 (1927).

**No Presumption of Materiality of Amendment.** — Where the journal does not show the effect of the amendment, there is no presumption that it was material. Frazier v. Board of Comm'rs, 194 N.C. 49, 138 S.E. 433 (1927).

**Evidence of Materiality.** — Slips of paper attached by a rubber band to the cover of the original bill when it was engrossed were not admissible in determining whether an amendment was material. Frazier v. Board of Comm'rs, 194 N.C. 49, 138 S.E. 433 (1927).

**Materiality a Judicial Question.** — Whether an amendment is material and required to be passed in accordance with this section is a question of law for the court, under the facts, and is not controlled by an agreement between the parties. Wagstaff v. Central Hwy. Comm'n, 174 N.C. 377, 93 S.E. 908 (1917).

**Validation by Later Act.** — Where a statute, pledging the faith and credit of the State in issuing State bonds, has not been passed in accordance with the provisions of this section and is therefore invalid, its invalidity may be cured by a later statute passed as the Constitution requires, referring to the former statute, and supplying the omissions, and the bonds thereunder issued after the question has been submitted to and approved by the voters of the State, as the statute required, are valid. Hinton v. Lacy, 193 N.C. 496, 137 S.E. 669 (1927).

**Change in Caption.** — A slightly different caption retaining the number of the original bill was an immaterial amendment. Brown v. Road Comm'rs, 173 N.C. 598, 92 S.E. 502 (1917).

**Substitution of Name of Commissioner.** — An amendment in the second branch of the legislature substituting the name of a commissioner does not broaden the scope of the act or affect its financial feature, and the failure in the first branch to comply with this section will not alone affect its validity. Brown v. Road Comm'rs, 173 N.C. 598, 92 S.E. 502 (1917).

**Curtailing Territory to Which Indebtedness Applied.** — Where a bill was introduced in one branch of the legislature for the issuance of bonds, and amendments were made by the other branch, withdrawing certain of the more wealthy and popular townships from the liability for the indebtedness to be created, except under condition requiring the approval of the voters, the amendment was a material one, requiring for the validity of the act that it be passed in accordance with the requirements of this section. Claywell v. Board of Comm'rs, 173 N.C. 657, 92 S.E. 481 (1917).

An act empowering special school districts of the State to issue bonds, which followed the requirements of this section except that upon its last reading, by amendment, it was made to apply only to one district in the State, the effect of the amendment being to exclude the other districts, and the act being regularly enacted as to the one district retained, was valid as to that district. Gregg v. Board of Comm'rs, 162 N.C. 479, 78 S.E. 301 (1913).

**Substitution of Tax Bill.** — Where a bill authorizing a levy of taxes for road purposes was read and referred to a committee, and the committee recommended a substitute, resulting in the tabling of the original bill and the passing of the substitute on two separate days in that branch of the legislature, and otherwise conforming to the requirements of this section, in both branches, the substitute would be regarded, in the contemplation of the Constitution, as an amendment to the original bill introduced, and the act could not successfully be questioned as not having passed on the several separate days required of a bill of this character. Edwards v. Nash County Bd. of Comm'rs, 183 N.C. 58, 110 S.E. 600 (1922).

**Increase in Tax Rate.** — When an act was passed by the legislature authorizing a graded school district to vote on the question of issuing school bonds in a certain amount, and amended at a subsequent session so as to authorize bonds to a larger amount and to run a longer time, both acts having been passed upon their several readings, with aye and no vote according to this section, an issue of bonds under a still later and similar act for a larger amount and upon a greater rate of taxation was invalid in toto when the later act was not likewise passed in accordance with this section. Russell v. Town of Troy, 159 N.C. 366, 74 S.E. 1021 (1912).

**Increase in Interest Rate on Bonds.** — An amendment to an act authorizing a county to issue bonds for road construction, which increases the rate of interest from 5% to 6%, involved material change in the former law. Guire v. Board of Comm'rs, 177 N.C. 516, 99 S.E. 430 (1919).

**Where a municipal charter authorizing issuance of bonds was subsequently amended** with regard thereto, but upon condition that the proposition be submitted to the voters, which was never done, and the legislature attempted to pass a still later law amending the former act but not in accordance with the requirements of this section, the later acts were of no effect, leaving the charter of the town as to these provisions open, under the terms of which the bonds could yet be issued. Cottrell v. Town of Lenoir, 173 N.C. 138, 91 S.E. 827 (1917).

**Subsequent Act Requiring Referendum on Bond Issue.** — Where the legislature passed an act authorizing a county to pledge its faith and credit in the issuance of bonds upon its several readings, upon its aye and no vote in accordance with this section, and by later ratification of an act requires the question to be submitted to the qualified voters, it was not necessary that the later ratified act also be passed in accordance with the constitutional requirement, and thus, in the absence of a proper election, the bond issue would be declared invalid. Graham County v. W.K. Terry & Co., 194 N.C. 22, 138 S.E. 443 (1927).

Where the legislature passed an act authorizing a county to issue bonds according to the provisions of this section, it was within its power to add a provision that the question be first submitted to the electorate of the county. Graham County v. W.K. Terry & Co., 194 N.C. 22, 138 S.E. 443 (1927).

**An amendment which made a material change in the valid act it proposed to amend** was unconstitutional, and the commissioners were without authority to levy the tax specified in the later act. Township Rd. Comm'n v. Board of Comm'rs, 178 N.C. 61, 100 S.E. 122 (1919), cert. denied, 329 N.C. 270, 407 S.E.2d 838 (1991).

## Sec. 24. Limitations on local, private, and special legislation.

(1) *Prohibited subjects.* The General Assembly shall not enact any local, private, or special act or resolution:

(a) Relating to health, sanitation, and the abatement of nuisances;

(b) Changing the names of cities, towns, and townships;

(c) Authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys;

(d) Relating to ferries or bridges;

(e) Relating to non-navigable streams;

(f) Relating to cemeteries;

(g) Relating to the pay of jurors;

(h) Erecting new townships, or changing township lines, or establishing or changing the lines of school districts;

(i) Remitting fines, penalties, and forfeitures, or refunding moneys legally paid into the public treasury;

(j) Regulating labor, trade, mining, or manufacturing;

(k) Extending the time for the levy or collection of taxes or otherwise relieving any collector of taxes from the due performance of his official duties or his sureties from liability;

(*l*) Giving effect to informal wills and deeds;

(m) Granting a divorce or securing alimony in any individual case;

(n) Altering the name of any person, or legitimating any person not born in lawful wedlock, or restoring to the rights of citizenship any person convicted of a felony.

(2) *Repeals.* Nor shall the General Assembly enact any such local, private, or special act by the partial repeal of a general law; but the General Assembly may at any time repeal local, private, or special laws enacted by it.

(3) *Prohibited acts void.* Any local, private, or special act or resolution enacted in violation of the provisions of this Section shall be void.

(4) *General laws.* The General Assembly may enact general laws regulating the matters set out in this Section.

**Cross References.** — As to the organization and modification of school districts, see G.S. 115C-65 et seq.

**History.** — The provisions of this section, with the exception of subdivisions (m) and (n) of subsection (1), are similar to those of Art. II, § 29, Const. 1868, as added in 1916 and amended in 1962. The provisions of subdivision (m) of subsection (1) are similar to those of Art. II, § 10, Const. 1868, and the provisions of subdivision (n) of subsection (1) are similar to those of Art. II, § 11, Const. 1868.

**Legal Periodicals.** — For note on constitutionality of local laws, see 36 N.C.L. Rev. 537 (1958).

For article discussing the history and present vitality of this section, see 45 N.C.L. Rev. 340 (1967).

For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

For article, "A History of Liquor-By-The-Drink Legislation in North Carolina," see 1 Campbell L. Rev. 61 (1979).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

As to comment discussing beach access legislation as unconstitutional local legislation, see 64 N.C.L. Rev. 159 (1985).

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

For note, "Town of Emerald Isle v. State of North Carolina: A New Test for Distinguishing Between General Laws and Local Legislation," see 66 N.C.L. Rev. 1096 (1988).

For comment, "Legal Analysis of the Constitutionality of the Water Supply Watershed Protection Act of 1989 and the Hyde Bill," see 29 Wake Forest L. Rev. 1279 (1994).

For article, "Do North Carolina Governments Need Home Rule," see 84 N.C. L. Rev. 1983 (2006).

## CASE NOTES

I. General Consideration.
II. Health, Sanitation and Nuisances.
III. Names of Cities, Towns and Townships.
IV. Highways, Streets and Alleys.
V. Ferries and Bridges.
VI. Lines of School Districts.
VII. Regulation of Trade.
VIII. Levy or Collection of Taxes.
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### I. GENERAL CONSIDERATION.

***Editor's Note.*** *— Some of the cases cited below were decided under former Art. II, § 10, Const. 1868, and under Art. II, § 29, Const. 1868, as amended.*

**Purpose of Section.** — This section is remedial in its nature and was intended not only to free the legislature of petty detail but also to require uniform and coordinated action under general laws in regard to the matters therein stipulated which are related to the welfare of the people of the whole State; and the application of the section should not be denied on any unsubstantial distinction which would defeat its purpose. Board of Health v. Board of Comm'rs, 220 N.C. 140, 16 S.E.2d 677 (1941).

In adopting this section, the people were motivated by the desire that the General Assembly should legislate for North Carolina in respect to the subjects specified as a single united commonwealth rather than as a conglomeration of innumerable discordant communities. To prevent this laudable desire from degenerating into a mere pious hope, they decreed in emphatic and express terms that any local, private, or special act or resolution passed in violation of the provisions of this section shall be void, no matter how praiseworthy or wise such local, private, or special act or resolution may be. Idol v. Street, 233 N.C. 730, 65 S.E.2d 313 (1951).

It was the purpose of this section to free the General Assembly from the enormous amount of petty detail which had been occupying its attention, to enable it to devote more time and attention to general legislation of statewide interest and concern, to strengthen local self-government by providing for the delegation of local matters by general laws to local authorities, and to require uniform and coordinated action under general laws on matters related to the welfare of the whole State. High Point Surplus Co. v. Pleasants, 264 N.C. 650, 142 S.E.2d 697 (1965).

The purpose of this section was to relieve the General Assembly from the necessity of passing on laws relating to certain specified matters in which only a small territory or a few persons were concerned, and to thereby enable members of the General Assembly to devote their time and attention to the enactment of legislation important to the entire State. Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967); Town of Emerald Isle ex rel. Smith v. State, 320 N.C. 640, 360 S.E.2d 756 (1987).

It was the purpose of this section to free the General Assembly from the enormous amount of petty detail which had been occupying its attention, to enable it to devote more time and attention to general legislation of statewide interest and concern, to strengthen local self-government by providing for the delegation of local matters by general laws to local authorities, and to require uniform and coordinated action under general laws on matters related to the welfare of the whole State of North Carolina.

**Effect of Section.** — The modification wrought by this section is that now a local, private or special act, dealing with designated subjects, is void as violative of this section. State v. Chestnutt, 241 N.C. 401, 85 S.E.2d 297 (1955).

The constitutional prohibition against local acts simply commands that when legislating in certain specified fields, the General Assembly must make rational distinctions among units of local government which are reasonably related to the purpose of the legislation. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

**An act is not invalid merely because it is local** unless it violates some constitutional provision. State v. Smith, 265 N.C. 173, 143 S.E.2d 293 (1965).

This section does not forbid local acts passed in the exercise of delegated police power if they do not relate to the matters therein prohibited. State v. Smith, 265 N.C. 173, 143 S.E.2d 293 (1965).

**Constitutionality of Statutes Supplementing General Laws.** — Statutes which do not directly contravene this section, but supplement general laws and policy, or aid in administering or financing policy established by general law, are not unconstitutional, especially when the administrative unit is local in nature. McIntyre v. Clarkson, 254 N.C. 510, 119 S.E.2d 888 (1961).

**Prospective Effect of Statute's Unconstitutionality.** — Where defendants reasonably relied on invalid statute and acted in good faith in carrying out the mandate of the General Assembly, the trial court did not err by directing the effect of the statute's unconstitutionality to have only a prospective application. City of New Bern v. New Bern-Craven County Bd. of Educ., 113 N.C. App. 98, 437 S.E.2d 655 (1993), aff'd, 338 N.C. 430, 450 S.E.2d 735 (1994).

**As to the scope of legislative power,** see Webb v. Port Comm'n, 205 N.C. 663, 172 S.E. 377 (1934).

**A statute is either "general" or "local";** there is no middle ground. High Point Surplus Co. v. Pleasants, 264 N.C. 650, 142 S.E.2d 697 (1965); Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967); Smith v. County of Mecklenburg, 280 N.C. 497, 187 S.E.2d 67 (1972).

**Reasonable Classification Test.** — When an employer claimed that a county ordinance regulating employment discrimination and the enabling legislation allowing its enactment were invalid local acts which regulated labor and trade, the appropriate test to apply in determining whether the legislation in question was general or local was the reasonable classification test.

**The distinguishing factors between a valid general law and a prohibited local act** are the related elements of reasonable classification and uniform application. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

**What Are General Laws.** — For a law to be general, it is only required that the objects of its operation be reasonably classified. McIntyre v. Clarkson, 254 N.C. 510, 119 S.E.2d 888 (1961).

Statutes relating to persons or things as a class are general laws. McIntyre v. Clarkson, 254 N.C. 510, 119 S.E.2d 888 (1961).

A law is general if it applies to and operates uniformly on all the members of any class of persons, places, or things requiring legislation peculiar to itself in matters covered by the law. High Point Surplus Co. v. Pleasants, 264 N.C. 650, 142 S.E.2d 697 (1965); Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967).

A general law defines a class which reasonably warrants special legislative attention and applies uniformly to everyone in the class. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

A law is general if any rational basis reasonably related to the objective of the legislation can be identified which justifies the separation of units of local government into included and excluded categories. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

**Classifications Within General Laws.** — Classifications must be general within the limits of the subject matter. They must be reasonable, and the statute must affect all within the class uniformly. Classifications must not be arbitrary or capricious, but must be natural and intrinsic and based on substantial differences. McIntyre v. Clarkson, 254 N.C. 510, 119 S.E.2d 888 (1961).

Classification must be reasonable and germane to the law. High Point Surplus Co. v. Pleasants, 264 N.C. 650, 142 S.E.2d 697 (1965); Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967).

Classification must not be discriminatory, arbitrary or capricious. High Point Surplus Co. v. Pleasants, 264 N.C. 650, 142 S.E.2d 697 (1965); Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967).

Classification must be based on a reasonable and tangible distinction and operate the same on all parts of the State under the same conditions and circumstances. High Point Surplus Co. v. Pleasants, 264 N.C. 650, 142 S.E.2d 697 (1965); Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967).

Classification does not render a statute "local" if the classification is reasonable and based on rational difference of situation or condition. High Point Surplus Co. v. Pleasants, 264 N.C. 650, 142 S.E.2d 697 (1965); Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967); Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

While substantial distinctions are essential in classification, the distinctions need not be scientific or exact. The legislature has wide discretion in making classifications. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

**Universality is immaterial** so long as those affected are reasonably different from those excluded and, for the purpose of the statute, there is a logical basis for treating them in a different manner. High Point Surplus Co. v. Pleasants, 264 N.C. 650, 142 S.E.2d 697 (1965).

**There is no constitutional requirement that a regulation must reach every class** to which it might be applied — that the legislature must be held rigidly to the choice of regulating all or none. It is enough that the present statute strikes at the evil where it is felt, and reaches the class of cases where it most frequently occurs. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

**What Are Local Acts.** — A local act is one operating only in a limited territory or specified locality. Idol v. Street, 233 N.C. 730, 65 S.E.2d 313 (1951); Carolina-Virginia Coastal Hwy. v. Coastal Tpk. Auth., 237 N.C. 52, 74 S.E.2d 310 (1953); Board of Managers of James Walker

Mem. Hosp. v. City of Wilmington, 237 N.C. 179, 74 S.E.2d 749 (1953).

When the persons or things subject to the law are not reasonably different from those excluded, the statute is local or special. McIntyre v. Clarkson, 254 N.C. 510, 119 S.E.2d 888 (1961).

The phrase "local law" means, primarily at least, a law that in fact, if not in form, is confined within territorial limits other than that of the whole State, or applies to any political subdivision or subdivisions of the State less than the whole, or to the property and persons of a limited portion of the State, or to a comparatively small portion of the State, or is directed to a specific locality or spot, as distinguished from a law which operates generally throughout the State. McIntyre v. Clarkson, 254 N.C. 510, 119 S.E.2d 888 (1961).

A law is local where, by force of an inherent limitation, it arbitrarily separates some places from others upon which, but for such limitation, it would operate, and where it embraces less than the entire class of places to which such legislation would be necessary or appropriate, having regard to the purpose for which the legislation was designed, and where classification does not rest on circumstances distinguishing the places included from those excluded. High Point Surplus Co. v. Pleasants, 264 N.C. 650, 142 S.E.2d 697 (1965); Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967).

A local act is an act applying to fewer than all counties, in which the affected counties do not rationally differ from the excepted counties in relation to the purpose of the act. Smith v. County of Mecklenburg, 280 N.C. 497, 187 S.E.2d 67 (1972).

A local act is one which unreasonably singles out a class for special legislative attention, or which, having made a reasonable classification, does not apply uniformly to all members of the designated class. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

**Determining Nature of Act.** — Determination of whether a statute is a local one prohibited by this section should be largely left to the facts and circumstances of each particular case, giving significance to the rule that legislative acts are presumed to have been rightfully passed from proper motives, and that a classification of this kind, when made by them, should not be disturbed unless it is manifestly arbitrary and invalid. In re Harris, 183 N.C. 633, 112 S.E. 425 (1922).

In determining whether an enactment is a general law, legislative intent must be found from the language of the act, its legislative history, and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied and the actual purpose to be accomplished. In re Indian Hills, 280 N.C. 659, 186 S.E.2d 909 (1972).

**Courts Look Beyond Form of Statutes.** — In determining whether a statute relating to matters enumerated in this section is a "local, private, or special" act inhibited by this section or a "general law" which the General Assembly has the power to pass, the courts will look beyond the form of the act and ascertain whether the statute, in fact, is generally and usually applicable throughout the area comprising the State. State v. Dixon, 215 N.C. 161, 1 S.E.2d 521 (1939); In re Indian Hills, 280 N.C. 659, 186 S.E.2d 909 (1972).

**The mere fact that a statute applies only to certain units of local government** does not by itself render the statute a prohibited local act. Only if the statutory classification is unreasonable or under-inclusive will the statute be voided as a prohibited local act. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

**The number of counties included or excluded** is not necessarily determinative. Conceivably, a statute may be local if it excludes only one county. On the other hand, it may be general if it includes only one or a few counties. It is a matter of classification. High Point Surplus Co. v. Pleasants, 264 N.C. 650, 142 S.E.2d 697 (1965); Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967).

**A statute applicable to a single city, without reasonable distinction** between such city and other cities or towns for the purpose of classification, is a local act. Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967).

**Annexation Provisions.** — Sections 160A-45 et seq. do not violate this section, which prohibits the General Assembly from enacting "any local, private, or special act or resolution" in regard to certain enumerated subjects. This constitutional provision does not apply to annexation proceedings by municipalities, since N.C. Const., Art. VII, § 1 authorizes the General Assembly "except as otherwise prohibited by this Constitution" to "give such powers and duties to counties, cities, and towns and other governmental subdivisions as it may deem advisable," and no other provision of the Constitution prohibits the General Assembly from enacting special legislation for the annexation of areas by municipalities. Campbell v. City of Greensboro, 70 N.C. App. 252, 319 S.E.2d 323, cert. denied and appeal dismissed, 312 N.C. 492, 322 S.E.2d 553 (1984).

**Act Reviving a Town Charter.** — An Act purporting to revive a town, which local citizens attacked, arguing that the new town contained fewer acres than the "true" town, did not violate this provision, because the Act was not a prohibited local act. Bethania Town Lot Comm.

v. City of Winston-Salem, 348 N.C. 664, 502 S.E.2d 360 (1998).

**Corporate Boundaries.** — Act which decreased the corporate boundaries of town was constitutional and plaintiffs were time-barred from asserting any further challenges. Bethania Town Lot Comm. v. City of Winston-Salem, 126 N.C. App. 783, 486 S.E.2d 729 (1997).

**National Park.** — The provision of Laws 1927, c. 48, for the acquisition of lands for a national park affects the interest of the people of the State, and though local as to location, was for a public use in contemplation of its acquisition by the State for the purpose outlined in the act. Yarborough v. North Carolina Park Comm'n, 196 N.C. 284, 145 S.E. 563 (1928).

**Filing Fee in Primary Elections.** — In no sense is the filing fee required of candidates in primary elections a local law as condemned by this section. McLean v. Durham County Bd. of Elections, 222 N.C. 6, 21 S.E.2d 842 (1942).

**Session Laws 1965, c. 1051,** was not violative of this section. Hobbs v. County of Moore, 267 N.C. 665, 149 S.E.2d 1 (1966).

**Session Laws 1967, c. 506,** a local act relating to municipal eminent domain procedures, did not involve any of the forbidden subjects listed in this section. City of Durham v. Manson, 21 N.C. App. 161, 204 S.E.2d 41, modified on other grounds, 285 N.C. 741, 208 S.E.2d 662 (1974).

**General laws regulating the change of a person's name,** and prescribing a procedure therefor, do not abrogate the common-law rule which allows a person to change his name without resort to legal procedure or repeal it by implication or otherwise; they merely affirm and are in aid of the common-law rule and provide an additional method of effecting a change of name and, more importantly, provide a method for recording the change. In re Mohlman, 26 N.C. App. 220, 216 S.E.2d 147 (1975).

**The Coastal Area Management Act of 1974 (§ 113A-100 et seq.)** is a general law which the General Assembly had power to enact. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

**Cap on Punitive Damages.** — Section 1D-25, placing a cap on an award of punitive damages, is not unconstitutional special legislation because it does not constitute remittitur. Rhyne v. K-Mart Corp., 149 N.C. App. 672, 562 S.E.2d 82, 2002 N.C. App. LEXIS 316 (2002), aff'd, 358 N.C. 160, 594 S.E.2d 1 (2004).

**Applied** in Floyd v. Lumberton City Bd. of Educ., 71 N.C. App. 670, 324 S.E.2d 18 (1984).

**Cited** in Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971); Thompson v. Whitley, 344 F. Supp. 480 (E.D.N.C. 1972); Variety Theatres, Inc. v. Cleveland County, 282 N.C. 272, 192 S.E.2d 290 (1972); Wood v. City of Fayetteville, 43 N.C. App. 410, 259 S.E.2d 581 (1979); Chem-Security Sys. v. Morrow, 61 N.C. App. 147, 300 S.E.2d 393 (1983); Clark v. Craven Regional Medical Auth., 326 N.C. 15, 387 S.E.2d 168 (1990); Hamlet HMA, Inc. v. Richmond County, 138 N.C. App. 415, 531 S.E.2d 494, 2000 N.C. App. LEXIS 636 (2000); Property Rights Advocacy Group v. Town of Long Beach, 173 N.C. App. 180, 617 S.E.2d 715, 2005 N.C. App. LEXIS 1924 (2005).

## II. HEALTH, SANITATION AND NUISANCES.

**Consolidation of City and County Health Departments.** — Session Laws 1945, c. 86, which attempted to authorize Forsyth County and Winston-Salem to consolidate their health departments and name a joint city-county board of health and appoint joint city-county health officers, and which expressly repealed to the extent of any conflict all laws in conflict therewith, was a local act relating to health, and was void for repugnancy to this section. Idol v. Street, 233 N.C. 730, 65 S.E.2d 313 (1951); Board of Managers v. City of Wilmington, 237 N.C. 179, 74 S.E.2d 749 (1953).

**Local Health and Sanitation Acts.** — Acts held to be "local," and related to "health" and "sanitation," were prohibited subjects of legislation and therefore unconstitutional. City of New Bern v. New Bern-Craven County Bd. of Educ., 113 N.C. App. 98, 437 S.E.2d 655 (1993), aff'd, 338 N.C. 430, 450 S.E.2d 735 (1994).

**Creation and Naming of County Health Board.** — Public-Local Laws of 1931, c. 322, which undertook to create and name the members of a county board of health for Madison County alone, which board was charged with the duty of inspecting county institutions and seeing that they were kept in a sanitary condition, and selecting a physician to vaccinate against disease, was a local act relating to health and sanitation prohibited by this section. Sams v. Board of County Comm'rs, 217 N.C. 284, 7 S.E.2d 540 (1940).

**Authorization of Care of Indigent Sick and Afflicted Poor.** — An act which authorized the city and county to make provisions for "the hospitalization, medical attention, and care of the indigent sick and afflicted poor" of the city and county alone was a local act relating to health, and void as in direct conflict with this section. Board of Managers v. City of Wilmington, 237 N.C. 179, 74 S.E.2d 749 (1953).

**Erection of Hospital.** — An act authorizing a certain county to erect a tuberculosis hospital, issue bonds therefor, and provide a tax for its maintenance, upon the approval of the voters, was both a special and local act and void under this section. Armstrong v. Board of

Comm'rs, 185 N.C. 405, 117 S.E. 388 (1923).

**Local Annexation Statute.** — As G.S. 160A-49.3 provides for solid waste collection to newly annexed areas of cities under the general law providing for annexation, and as the General Assembly made G.S. 160A-49.3 applicable to the annexation of certain land to the City of Greensboro by Session Laws 1985 (Reg. Sess., 1986), c. 818, s. 3, that act was not a local act in violation of this section, since it did not subject the annexed area to a different treatment than it would have faced if the city had annexed the area under the general annexation law, but assured that it would receive the same treatment. Piedmont Ford Truck Sales, Inc. v. City of Greensboro, 324 N.C. 499, 380 S.E.2d 107 (1989).

**Inspections pursuant to the State Building Code affect health and sanitation;** thus acts that altered the legislative directive of G.S. 160A-411, that the city shall determine who will perform the inspections under the Code, were local legislation that shifted responsibility for enforcement of laws affecting the health of the public, and were barred under this section of the Constitution. City of New Bern v. New Bern-Craven County Bd. of Educ., 338 N.C. 430, 450 S.E.2d 735 (1994).

**Sewer and Water Service for School Children.** — Session Laws 1951, c. 1075, was a local or special act. It related only to Randolph County, and in Randolph County affected only a single agency, the county board of education. It related to health and sanitation, since its sole purpose was to prescribe provisions with respect to sewer and water service for local school children in Randolph County. It purported to limit the power of the county board of education to provide for sanitation and healthful conditions in the schools by means of a sewerage system and an adequate water supply. These things being true, this statute was invalid under the mandatory terms of this section. Lamb v. Board of Educ., 235 N.C. 377, 70 S.E.2d 201 (1952).

**Municipal Sewerage System.** — Session Laws 1963, c. 1189, applicable solely to the town of Beaufort and providing that in the event the sewerage system of a municipality shall have been declared a source of unlawful pollution to adjacent streams or waterways the municipality should not be required to extend any sewerage outfalls into an area annexed by it, was a local act relating to health and sanitation within the meaning of this section and was unconstitutional and void. Gaskill v. Costlow, 270 N.C. 686, 155 S.E.2d 148 (1967); Safrit v. Costlow, 270 N.C. 680, 155 S.E.2d 252 (1967).

**Formation of Sewerage Districts.** — A statute authorizing the formation of sanitary sewerage districts within countywide limits, the boundaries of these to be fixed by certain designated local authorities in a specified manner, and done without previous notice to the voters, was not a "local, private or special act relating to health, sanitation, etc." Reed v. Howerton Eng'g Co., 188 N.C. 39, 123 S.E. 479 (1924).

**Creation of Sanitary District.** — Private Laws 1927, c. 229, attempting to create a sanitary district within certain lines within a county for the construction and maintenance of sewer and water systems, with certain assessments or taxing powers for the purpose, was void, being in violation of the provisions of this section. Drysdale v. Prudden, 195 N.C. 722, 143 S.E. 530 (1928).

**Creation of Drainage District.** — A statute creating and designating the boundaries of a drainage district and providing taxation for its construction and maintenance was for a necessary purpose and did not fall within the purview of N.C. Const., Art. V, § 2, requiring its submission to the voters within the district, nor was it a local, private or special act relating to health or sanitation prohibited by this section. Town of Kenilworth v. Hyder, 197 N.C. 85, 147 S.E. 736 (1929).

**Direction to Sheriff to Dispose of Cattle in a Particular Area.** — Session Laws 1959, c. 782, which related solely to the segment of the outer banks in Carter County between Beaufort Inlet and Ocracoke Inlet, and purported to authorize and direct the sheriff of Carteret County, without judicial inquiry of any kind, to remove and dispose of all cattle, etc., in this particular area, was a local act relating to the abatement of a public nuisance, and was unconstitutional and void as violative of this section. Chadwick v. Salter, 254 N.C. 389, 119 S.E.2d 158 (1961).

**Regulation of Use and Storage of Explosives.** — G.S. 153A-128, which permitted the county to enact ordinances regulating the use and storage of explosives, did not constitute an unlawful local law under N.C. Const. art. II, § 24, since it applied to all counties in the state. S. Blasting Servs. v. Wilkes County, 288 F.3d 584, 2002 U.S. App. LEXIS 7853 (4th Cir. 2002).

### III. NAMES OF CITIES, TOWNS AND TOWNSHIPS.

**What Is Prohibited.** — While this section forbids the General Assembly to pass any local, private or special act or resolution relating to changing the names of cities, towns or townships, it provides that the General Assembly shall have power to pass general laws regulating such matters. Hunsucker v. Winborne, 223 N.C. 650, 27 S.E.2d 817 (1943).

### IV. HIGHWAYS, STREETS AND ALLEYS.

**Scope of Prohibition.** — This section applies only to a local act which authorizes the laying out, opening, altering, or discontinuing of a given particular and designated highway, street, or alley. State v. McBane, 276 N.C. 60, 170 S.E.2d 913 (1969).

**Limitations of Vehicular Access on Public Streets in Town.** — The case annotated under this catchline in the main volume has been reversed. See Town of Emerald Isle ex rel. Smith v. State, 320 N.C. 640, 360 S.E.2d 756 (1987).

**Streets Within City Limits.** — The unlimited power in the General Assembly to provide for the creation and extension of corporate limits of municipal corporations would seem to include the right to vest in such municipal corporations the authority to levy taxes to lay out and maintain highways and streets within such limits, since they are essential to the existence of such corporations, and such private act would not seem to contravene this section. Matthews v. Town of Blowing Rock, 207 N.C. 450, 177 S.E. 429 (1934).

**Improvement of Streets and Alleys.** — Local acts relating to the improvement of streets and alleys generally in a city or town, and authorizing the assessment of the cost thereof against the abutting property, do not conflict with this section, although unquestionably an act purporting to authorize the laying out of particular streets or highways, or to authorize the maintenance of a designated street or streets, or the discontinuance thereof, would be repugnant to this section. In re Resolutions Passed by City Council, 243 N.C. 494, 91 S.E.2d 171 (1956).

**Subsequent Local Law Increasing Authority Granted to City Before Effective Date of Section.** — Where a local statute giving a municipality power to improve its streets and assess abutting owners for a part of the cost was enacted prior to the effective date of this section, a subsequent local law which merely increased the jurisdiction and authority granted to the city in regard to such improvements did not violate the constitutional proscription. City of Goldsboro v. Atlantic C.L.R.R., 241 N.C. 216, 85 S.E.2d 125 (1954).

**Maintenance of County Highways.** — A public-local law applicable to the maintenance of the public highways of a county and authorizing taxation or issuance of bonds for this purpose, with certain specific supervision and control, is not such local or special act as falls within the inhibition of this section, where it does not affect the "laying out, opening, altering, maintaining or discontinuing" the then existing highways, etc. State v. Kelly, 186 N.C. 365, 119 S.E. 755 (1923).

**County Subdivision Ordinances.** — The statutory provisions of former G.S. 153-266.3 and 153-266.4 as to what could and what had to be included in a county subdivision ordinance, did not constitute "authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys" within the meaning of this section. State v. McBane, 276 N.C. 60, 170 S.E.2d 913 (1969).

**Board for Control of County Roads.** — A statute that abolishes two boards of road commissioners in a county and gives to another board, created by the same act, entire control and management of the public roads and bridges of the county, does not violate this section. Huneycutt v. Board of Rd. Comm'rs, 182 N.C. 319, 109 S.E. 4 (1921).

**A public-local law authorizing county commissioners to take over a specified highway** within the county, constituting one of the principal highways within the county, connecting two important State highways, transferring to the said commissioners the bridges of the various townships for their care and supervision, was not violative of this section. Hill v. Board of Comm'rs, 190 N.C. 123, 129 S.E. 154 (1925). See Thomson v. Harnett County, 209 N.C. 662, 184 S.E. 490 (1936).

**Issuance of County Road Bonds.** — An act of the legislature authorizing the issuance of county bonds for public roads is not in contravention of this section of the Constitution. Commissioners of Surry County v. Wachovia Bank & Trust Co., 178 N.C. 170, 100 S.E. 421 (1919); Board of Managers v. City of Wilmington, 237 N.C. 179, 74 S.E.2d 749 (1953).

An act of the legislature authorizing the road commissioners of a county to issue bonds, upon the approval of its electors, to obtain moneys for the expenditure upon certain particularly designated objects in respect to its public roads, which does not contain any provision for the laying out, altering or discontinuing any road or highway, does not contravene this section. Road Comm'rs v. Bank of Ashe, 181 N.C. 347, 107 S.E. 245 (1921).

**Distribution of Bond Proceeds.** — An act of the legislature may prescribe a rule by which the proceeds of the sales of bonds which it authorizes a county to issue for road purposes shall be disbursed and distributed in order to effect the best results, when it is confined to the control and management of the funds, and leaves to the local authorities the power given them by this section over "the laying out, opening, or discontinuance of highways." Board of Comm'rs v. Pruden & Co., 178 N.C. 394, 100 S.E. 695 (1919).

**Private Act Closing Certain Public Roads.** — Where part of the land in a private development was added to the playground of a public school, and the General Assembly, by private act (Private Laws of 1933, c. 72), declared that certain roads dedicated in the registered plot of the development were no longer needed and that the roads should be closed and added to the playground space for the school, this act was void as being a private or special act inhibited by this section. Glenn v. Board of Educ., 210 N.C. 525, 185 S.E. 781 (1936).

**Act Authorizing Construction of Toll Roads and Bridges in Five Counties Only.** — An act which authorized the construction and operation of toll roads and toll bridges within only five counties of the State was repugnant to this section and was therefore void. Carolina-Virginia Coastal Hwy. v. Coastal Tpk. Auth., 237 N.C. 52, 74 S.E.2d 310 (1953).

**State Law to Establish Access Facilities to Beaches Is a General Law.** — Session Laws 1983, Chapter 539, the purpose of which is to establish pedestrian beach access facilities for general public use in the vicinity of Bogue Inlet, is a general law and not a local act. Town of Emerald Isle ex rel. Smith v. State, 320 N.C. 640, 360 S.E.2d 756 (1987).

**Private Laws 1925, c. 216,** was not a special statute relating to roads inhibited by this section, the act not relating to the laying out, opening, altering, or discontinuance of any particular and designated highway, street, or alley. Deese v. Town of Lumberton, 211 N.C. 31, 188 S.E. 857 (1936).

### V. FERRIES AND BRIDGES.

**Building Bridges Generally.** — A legislative enactment relating to the building of bridges by a county over a nonnavigable stream or river does not necessarily come within the purview and control of this section. Mills v. Board of Comm'rs, 175 N.C. 215, 95 S.E. 481 (1918).

**Direction that Bridge Be Built at Specified Place.** — While authority given by statute to a county or other political agency of a state to issue bonds for highways in aid to their maintenance or construction is not direct, local, or special legislation as is prohibited by this section, it is otherwise where the statute directs the building of a bridge at a specified place across a stream between two counties, and as an incident permits the issuance of bonds or the levying of taxes for the purpose, pledging the faith and credit of the State. Day v. Commissioners of Yadkin County, 191 N.C. 780, 133 S.E. 164 (1926).

### VI. LINES OF SCHOOL DISTRICTS.

**Local Laws Establishing or Changing Lines of School Districts Prohibited.** — Since the enforcement of this section, special acts of the legislature to establish or change the lines, etc., of a school district, and any proceedings under it, are null and void. Galloway v. Board of Educ., 184 N.C. 245, 114 S.E. 165 (1922).

**Meaning of "School District".** — A "school district" is an area within a county in which one or more public schools must be maintained. Hobbs v. County of Moore, 267 N.C. 665, 149 S.E.2d 1 (1966).

**An "administrative unit" is not a "school district"** within the meaning of this section. Hobbs v. County of Moore, 267 N.C. 665, 149 S.E.2d 1 (1966).

**A statute which creates a public school district and allows a bond issue,** upon the approval of voters, for its equipment and maintenance, is a local or special act, prohibited by this section. Robinson v. Board of Comm'rs, 182 N.C. 590, 109 S.E. 855 (1921).

A statute which lays off or defines by boundary a certain territory as a graded school district within a county, and provides for an issue of bonds upon the approval of the voters therein, for the necessary buildings and maintenance, comes within the provision of this section. Board of Trustees v. Mutual Loan & Trust Co., 181 N.C. 306, 107 S.E. 130 (1921).

**Bonds and Taxes Authorized in Void Act.** — Where an act to create a public school district is unconstitutional, because it violates this section, the provision for bonds and taxation to carry out the purpose of the act is likewise void. Sechrist v. Board of Comm'rs, 181 N.C. 511, 107 S.E. 503 (1921).

An act for the purpose of ratifying a county ordinance providing for the issuance of bonds and levy of taxes for school purposes in a district established without authority is a local, private or special act prohibited by this section, and the issuance of such bonds and levy of such taxes will be permanently enjoined. Woosley v. Commissioners of Davidson County, 182 N.C. 429, 109 S.E. 368 (1921).

**Allowing Existing School District to Submit Question of Bonds and Taxation to Voters.** — A statute allowing an existing consolidated school district to submit the question of taxation and the issue of bonds for school purposes to the district is not prohibited by this section. Burney v. Commissioners of Bladen County, 184 N.C. 274, 114 S.E. 298 (1922).

**As to increase of bonds by existing school district,** see Roebuck v. Board of Trustees, 184 N.C. 144, 113 S.E. 676 (1922).

**Incorporation of Existing School Districts.** — Incorporating existing local school districts for all purposes relating to the issuance or payment of bonds upon the approval of the voters of a district is valid and is not in contravention of this section. Board of Trustees v. Mutual Loan & Trust Co., 181 N.C. 306, 107 S.E. 130 (1921); Paschal v. Johnson, 183 N.C. 129, 110 S.E. 841 (1922).

**Setting Up Machinery Under Which County May Establish School Districts.** — This section prohibits the legislature from passing any special, private or local act which ex proprio vigore undertakes to establish or change the boundaries of a school district, but this section does not proscribe the legislature from setting up machinery under which a county, as the administrative unit charged with making provisions for necessary capital outlay, may create school districts or special bond tax units within the county to accomplish this purpose. Therefore, Public-Local Laws of 1937, c. 279, which provided the machinery under which the county of Buncombe could establish school districts or special bond tax units in the county, was not in contravention of this section. Fletcher v. Collins, 218 N.C. 1, 9 S.E.2d 606 (1940); Hinson v. Board of Comm'rs, 218 N.C. 13, 9 S.E.2d 614 (1940).

**Enabling Consolidation of County and City School Administrative Units Under General Laws.** — A statute enabling the consolidation of county and city school administrative units under the general laws and the levy of certain taxes for the construction and operation of the schools of the consolidated unit does not violate this section, since it does not, in itself, undertake to establish or change the lines of a school district, but merely provides machinery for action by local units under the general law, and further provisions of the statute requiring that the merger and the levy of the taxes be approved by a vote does not alter this result. Peacock v. County of Scotland, 262 N.C. 199, 136 S.E.2d 612 (1964).

**Extending Limits of City or Town in which Schools May Be Maintained.** — While the boundaries of a "district" may be coterminous with those of a city or town, it does not follow that an act extending the limits of a city or town in which public schools may be maintained is necessarily a special act establishing or changing the lines of school districts in violation of the Constitution. Hailey v. City of Winston-Salem, 196 N.C. 17, 144 S.E. 377 (1928).

**Recognizing School District in Changed City Limits.** — A public-local act that enlarged the city limits and recognized therein the independent existence of a public school district within the former limits was not contrary to the provisions of this section, as an attempt to establish a school district, or to change the limits of those already established. Duffy v. City of Greensboro, 186 N.C. 470, 120 S.E. 53 (1923).

## VII. REGULATION OF TRADE.

**Meaning of "Trade".** — A "trade" within the meaning of this section includes any employment or business embarked in for gain or profit. State v. Dixon, 215 N.C. 161, 1 S.E.2d 521 (1939); Orange Speedway, Inc. v. Clayton, 247 N.C. 528, 101 S.E.2d 406 (1958); State v. Smith, 265 N.C. 173, 143 S.E.2d 293 (1965).

"Trade," as used in this section, refers to a business venture embarked in for gain or profit by a person or a business corporation. Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967).

"Trade," within the meaning of this section, is a business venture for profit, and includes any employment or business embarked in for gain or profit. High Point Surplus Co. v. Pleasants, 264 N.C. 650, 142 S.E.2d 697 (1965); Smith v. County of Mecklenburg, 280 N.C. 497, 187 S.E.2d 67 (1972).

"Trade," as used in this section, refers to commerce engaged in by citizens of the State, and not a restricted activity conducted by the State itself. Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967); Smith v. County of Mecklenburg, 280 N.C. 497, 187 S.E.2d 67 (1972).

"Trade" refers to a business venture for profit. Nelson v. North Carolina State Bd. of Alcoholic Control, 26 N.C. App. 303, 216 S.E.2d 152, appeal dismissed, 288 N.C. 242, 217 S.E.2d 666 (1975).

**Private profit is an inherent element of the concept of trade** as used in subdivision (1)(j) of this section. Smith v. County of Mecklenburg, 280 N.C. 497, 187 S.E.2d 67 (1972).

**It was not contemplated under this section that the State would enter any trade** or business venture for profit. Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967).

**County Cannot Enact Its Own Employment Discrimination Ordinance.** — G.S. 153A-121 did not empower a county to enact its own employment discrimination ordinance as the county only possessed those powers validly delegated to it by the state, and the state's attempted delegation of this power to the county violated N.C. Const. art. II, § 24. Williams v. Blue Cross Blue Shield, 357 N.C. 170, 581 S.E.2d 415, 2003 N.C. LEXIS 595 (2003).

When the legislature passed legislation enabling a particular county to adopt an ordinance prohibiting employment discrimination, it violated subdivision (1)(j) of this section because there was no rational basis to treat this county differently from any other county as to this subject, nor was there evidence that the employment practices in this county were different from those in any other county in the state, and the legislation enabled the county to regulate labor and trade. Williams v. Blue Cross Blue Shield, 357 N.C. 170, 581 S.E.2d 415, 2003 N.C. LEXIS 595 (2003).

**Dispensing of intoxicating liquors by the State is not a "trade"** within the meaning of this section. Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967).

The word "trade" was not intended by the drafters of this section to include the monstrous and demanding problem of intoxicating liquors. Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967).

**Section Does Not Limit Power of State to Control Intoxicating Liquor.** — This section is not intended to limit or fetter the police power of the State in any manner in its control of intoxicating liquor. Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967).

Had it been the intention of the General Assembly to include the ever-present and important question of intoxicating liquor among the prohibited subjects in this section, the term "intoxicating liquor" would have been included in the enumerated list. Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967).

**Option Election Covering ABC Stores.** — Session Laws 1965, c. 650, authorizing a local option election in Reidsville to determine whether alcoholic beverage control stores may be operated in that city and providing for the establishment of a city board of alcoholic control if authority is granted, does not violate this section as the act of dispensing intoxicating liquor by the State is not a trade, but is a valid exercise of its police powers. Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967).

**The retail sale of beer and wine is a "trade"** within the meaning of the Constitution. Nelson v. North Carolina State Bd. of Alcoholic Control, 26 N.C. App. 303, 216 S.E.2d 152, appeal dismissed, 288 N.C. 242, 217 S.E.2d 666 (1975).

**A local act that authorizes or prohibits the sale of beer and wine** is a local act regulating or governing a trade and is void. Nelson v. North Carolina State Bd. of Alcoholic Control, 26 N.C. App. 303, 216 S.E.2d 152, appeal dismissed, 288 N.C. 242, 217 S.E.2d 666 (1975).

**The purchase, sale and serving of alcoholic beverages by a licensed restaurateur constitutes "trade"** within the meaning of subdivision (1)(j) of this section. Smith v. County of Mecklenburg, 280 N.C. 497, 187 S.E.2d 67 (1972).

**Statute which authorized an election in Mecklenburg County to determine whether mixed beverages would be sold** by the drink in that county was held to be a local act regulating trade and therefore unconstitutional and void as violative of subdivision (1)(j) of this section. Smith v. County of Mecklenburg, 280 N.C. 497, 187 S.E.2d 67 (1972).

**Session Laws 1945, c. 936,** which purported to grant discretionary authority to the governing bodies of municipalities in Vance, Scotland and Moore Counties to refuse to issue a license for the sale of fortified and unfortified wines within the corporate limits of such municipalities, was a local act regulating trade in violation of subdivision (1)(j) of this section. Food Fair, Inc. v. City of Henderson, 17 N.C. App. 335, 194 S.E.2d 213 (1973).

**Regulation of Professional Automobile and Motorcycle Racing.** — A statute applicable to one county alone, which attempts to regulate professional automobile and motorcycle racing, rather than automobile and motorcycle racing in general, is void as a local act regulating labor or trade. Orange Speedway, Inc. v. Clayton, 247 N.C. 528, 101 S.E.2d 406 (1958), holding Session Laws 1957, c. 588, void.

**A statute which provides for the operation of a dog racing track** by the licensee of the Morehead City Racing Commission was a local and special act relating to trade, and was unconstitutional. State ex rel. Taylor v. Carolina Racing Ass'n, 241 N.C. 80, 84 S.E.2d 390 (1954).

**Statute Authorizing County to Regulate Poolrooms, etc.** — Session Laws 1953, c. 1071, s. 1(3), as amended by Session Laws 1961, c. 943, s. 11/2(3), authorizing the Forsyth County board of commissioners to regulate public poolrooms, billiard parlors, dance halls, and clubs, was a local act regulating trade and, therefore, unconstitutional under this section. State v. Smith, 265 N.C. 173, 143 S.E.2d 293 (1965).

**A statute providing for the licensing and regulation of real estate brokers** and salesmen and imposing a license tax on those engaged in the trade in addition to the tax imposed by the Revenue Act for a statewide license was applicable to only a limited territory and specified localities and the act was therefore a local act regulating trade in contravention of this section. State v. Dixon, 215 N.C. 161, 1 S.E.2d 521 (1939).

**Statute including deputy sheriffs within term "employee" as used in the Workers' Compensation Act** is consonant with the provisions of this section. Towne v. Yancey County, 224 N.C. 579, 31 S.E.2d 754 (1944).

**Sunday Sale Laws as Regulation of Trade.** — A statute proscribing the sale on Sunday of merchandise falling within certain classifications is a statute regulating trade under the purview of this section. Treasure City of Fayetteville, Inc. v. Clark, 261 N.C. 130, 134 S.E.2d 97 (1964).

An act which restricts or regulates the operation, engaging in or carrying on of business, or prohibits the sale of merchandise, on Sunday, regulates trade. High Point Surplus Co. v. Pleasants, 264 N.C. 650, 142 S.E.2d 697 (1965).

**Sunday-Observance Ordinances, Generally.** — When a county or a city attempts to pass, under a local grant of police power, a Sunday-observance ordinance whose only effect is to regulate trade, the legislation must yield to this section, whether the purported authority to pass it is specifically conferred in the act or not. State v. Smith, 265 N.C. 173, 143 S.E.2d 293 (1965).

When enacted by cities and towns under general laws, Sunday-observance ordinances which are reasonable and do not discriminate within a class of competitors similarly situate have been upheld as a valid exercise of delegated police power. All such ordinances, when they proscribe buying and selling, whether it be, say, tangible merchandise or a ticket to an amusement or a sporting event, regulate trade under the broad definition of trade which has been adopted by the Supreme Court. Since, however, these city ordinances are passed under general laws, with reference to them there is no conflict between the exercise of the police power and this section. State v. Smith, 265 N.C. 173, 143 S.E.2d 293 (1965).

**If an ordinance prohibits all of a certain type of activity on Sunday,** as, e.g., motor vehicle racing, which might or might not be commercial, its exercise of police power does not conflict with this section, for its regulation of trade is merely incidental or consequential. State v. Smith, 265 N.C. 173, 143 S.E.2d 293 (1965).

Session Laws of 1949, c. 177, which bans all motor vehicle races on Sunday in Wake County without regard to the commercial or noncommercial character of the activity, is not an act regulating labor or trade within the meaning of this section. Persons whose activities are commercial in character are in no better position than those who engage in the proscribed activity without reference to profit. State v. Chestnutt, 241 N.C. 401, 85 S.E.2d 297 (1955).

**A statute which purported to authorize only 52 of the 100 counties** to regulate and prohibit the sale of goods, wares, and merchandise on Sunday, was a local act regulating trade and thus a violation of this section. State v. Smith, 265 N.C. 173, 143 S.E.2d 293 (1965).

**The 1963 amendment to § 14-346.2,** proscribing the sale on Sunday of merchandise of specific classifications within the State, but exempting designated counties and parts of counties therefrom, with provision that the areas exempted are exempted upon the classification of such areas as resort or tourist areas, but which does not define "resort area" and which as a matter of common knowledge does not exempt all recognized tourist areas of the State or, by its classifications of goods, preclude the sale only of such merchandise as is inappropriate to the tourist trade, is held void as a local law in violation of this section. Treasure City of Fayetteville, Inc. v. Clark, 261 N.C. 130, 134 S.E.2d 97 (1964).

**For case upholding former § 153-9(55),** see Whitney Stores, Inc. v. Clark, 277 N.C. 322, 177 S.E.2d 418 (1970).

**Section 160A-273, which permits municipalities to convey air rights over streets or other property,** is not a special act and does not violate subdivision (1)(j). Cheape v. Town of Chapel Hill, 320 N.C. 549, 359 S.E.2d 792 (1987).

**A local act which merely declared that the town had the capacity to engage in economic development projects,** with or without private parties, did not "regulate" trade and therefore did not violate subdivision (1)(j). Cheape v. Town of Chapel Hill, 320 N.C. 549, 359 S.E.2d 792 (1987).

### VIII. LEVY OR COLLECTION OF TAXES.

**An act relating to establishment and collection of tax liens,** which applies to only one county of the State, is void as a violation of this section. Town of Wake Forest v. Holding, 207 N.C. 808, 178 S.E. 594 (1935).

**Session Laws 1961, c. 916,** applicable only to Mecklenburg County, did not have the effect of extending the time for the assessment of taxes in Mecklenburg County, but merely gave the board of equalization and review of the county opportunity to act on appeals by property owners from the assessing authorities, and the statute did not vest the board with authority ex mero motu to increase valuations after the time limited by statute. Spiers v. Davenport, 263 N.C. 56, 138 S.E.2d 762 (1964).

### IX. DIVORCE AND ALIMONY.

**The only limitation on powers in enacting statutes relating to divorce** is found in this section. Cooke v. Cooke, 164 N.C. 272, 80 S.E. 178 (1913); Long v. Long, 206 N.C. 706, 175 S.E. 85 (1934).

**Jurisdiction over Divorce.** — Under this section jurisdiction over the subject matter of divorce is given only by statute. Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972).

## OPINIONS OF ATTORNEY GENERAL

**Statutory provisions that waived or modified the state competitive bid requirements for certain construction projects** by allowing a board of education to utilize alternative contracting methods to those normally specified for local school boards did not violate the prohibition against local or special acts regulating trade; this was despite the fact that the statutes applied to only one board of education and were, therefore, local in nature, because the clear intent of the legislation was to regulate the bid process, rather than trade, and the law operated uniformly on all potential contractors or bidders for the covered construction projects. See opinion of Attorney General to Representative Andrew T. Dedmon, North Carolina General Assembly, 1999 N.C. AG LEXIS 22 (10/18/99).

**Statutory Provisions Operating Uniformly Throughout the State.** — G.S. 153A-

77, allowing boards of commissioners of counties with populations greater than 425,000 to assume direct control over boards of health, social services, and mental health, developmental disabilities, and substance abuse services, does not violate subsection (1)(a) of this section because the statute and G.S. 122C-115, permitting counties, subject to certain prerequisites, to choose to operate their own mental health, developmental disabilities, and substance abuse services, operate uniformly throughout the state, even though there are different classifications based upon population. See opinion of Attorney General to Eddie S. Winstead III, Esq., Harrington, Ward, Gilleland & Winstead, L.L.P., 2002 N.C.A.G. 24 (9/6/02).

# ARTICLE III

# EXECUTIVE

## Section 1. Executive power.

The executive power of the State shall be vested in the Governor.

**Cross References.** — As to separation of powers, see N.C. Const., Art. I, § 6.

**History.** — The provisions of this section are similar to those of the first clause of Art. III, § 1, Const. 1868, as amended in 1872-1873 and 1944.

**Legal Periodicals.** — For note on the separation of powers and the power to appoint, see 66 N.C.L. Rev. 1109 (1988).

For article, "A Study in Separation of Powers: Executive Power in North Carolina," see 77 N.C.L. Rev. 2049 (1999).

### CASE NOTES

**"Executive Power" Defined.** — "Executive power" means the power of executing laws. The appointment of someone to execute the laws does not require the appointing party to execute the laws. State ex rel. Martin v. Melott, 320 N.C. 518, 359 S.E.2d 783 (1987).

**The Governor has the duty to supervise the official conduct of all executive officers.** Tice v. DOT, 67 N.C. App. 48, 312 S.E.2d 241 (1984).

The constitutional independence of executive offices, and their differing functions and duties, create clear potential for conflict between their respective holders. In the event of such conflict, power in the Attorney General to resolve, without their consent, controversies involving agencies or departments under the supervision of the Governor, could be abused by exercise in a manner effectively derogative of the Governor's constitutional duties to exercise executive power and to supervise the official conduct of all executive officers. The General Assembly, in the enactment of G.S. 114-2(2), did not intend to create such potential. Tice v. DOT, 67 N.C. App. 48, 312 S.E.2d 241 (1984).

**The duty of the attorney general to appear for the state in any court proceeding in which the state may be a party,** as provided in G.S. 114-2(1), does not violate this section. Martin v. Thornburg, 320 N.C. 533, 359 S.E.2d 472 (1987).

**Cited** in State ex rel. Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79 (1982).

## Sec. 2. Governor and Lieutenant Governor: election, term, and qualifications.

(1) *Election and term.* The Governor and Lieutenant Governor shall be elected by the qualified voters of the State in 1972 and every four years thereafter, at the same time and places as members of the General Assembly are elected. Their term of office shall be four years and shall commence on the first day of January next after their election and continue until their successors are elected and qualified.

(2) *Qualifications.* No person shall be eligible for election to the office of Governor or Lieutenant Governor unless, at the time of his election, he shall have attained the age of 30 years and shall have been a citizen of the United States for five years and a resident of this State for two years immediately preceding his election. No person elected to the office of Governor or Lieutenant

Governor shall be eligible for election to more than two consecutive terms of the same office. (1977, c. 363, s. 1.)

**History.** — The provisions of subsection (1) of this section are similar to those of Art. III, § 1, Const. 1868, as amended in 1872-1873 and 1944. The provisions of subsection (2) of this section are similar to those of Art. III, § 2, Const. 1868, as amended in 1962.

**Defeated Amendment Proposals.** — An amendment proposed by Session Laws 1981, c. 504, and defeated at the general election held in 1982, would have rewritten the first sentence of subsection (1) to provide that the Governor and Lieutenant Governor would be elected at the places and on the day prescribed by law.

An amendment proposed by Session Laws 1985, c. 768, ss. 2, 3 and 9.1(1), and defeated at the primary election held on May 6, 1986, would have amended this section by substituting "1988, and in 1993 and every four years thereafter" for "1972 and every four years thereafter" in the first sentence of subsection (1), by adding "except in 1988 at the same time and places as members of the United States House of Representatives are elected" at the end of the first sentence of subsection (1), and by adding "except that the term of office of those elected in 1988 shall be for five years" at the end of subsection (1).

**Editor's Note.** — Session Laws 1985 (Reg. Sess., 1986), c. 1010, repealed Session Laws 1985, c. 61, which had proposed to amend this section by rewriting the last sentence of subsection (2).

CASE NOTES

**The Governor has the duty to supervise the official conduct of all executive officers.** Tice v. DOT, 67 N.C. App. 48, 312 S.E.2d 241 (1984).

The constitutional independence of executive offices, and their differing functions and duties, create clear potential for conflict between their respective holders. In the event of such conflict, power in the Attorney General to resolve, without their consent, controversies involving agencies or departments under the supervision of the Governor, could be abused by exercise in a manner effectively derogative of the Governor's constitutional duties to exercise executive power and to supervise the official conduct of all executive officers. The General Assembly, in the enactment of G.S. 114-2(2), did not intend to create such potential. Tice v. DOT, 67 N.C. App. 48, 312 S.E.2d 241 (1984).

## Sec. 3. Succession to office of Governor.

(1) *Succession as Governor.* The Lieutenant Governor-elect shall become Governor upon the failure of the Governor-elect to qualify. The Lieutenant Governor shall become Governor upon the death, resignation, or removal from office of the Governor. The further order of succession to the office of Governor shall be prescribed by law. A successor shall serve for the remainder of the term of the Governor whom he succeeds and until a new Governor is elected and qualified.

(2) *Succession as Acting Governor.* During the absence of the Governor from the State, or during the physical or mental incapacity of the Governor to perform the duties of his office, the Lieutenant Governor shall be Acting Governor. The further order of succession as Acting Governor shall be prescribed by law.

(3) *Physical incapacity.* The Governor may, by a written statement filed with the Attorney General, declare that he is physically incapable of performing the duties of his office, and may thereafter in the same manner declare that he is physically capable of performing the duties of his office.

(4) *Mental incapacity.* The mental incapacity of the Governor to perform the duties of his office shall be determined only by joint resolution adopted by a vote of two-thirds of all the members of each house of the General Assembly. Thereafter, the mental capacity of the Governor to perform the duties of his office shall be determined only by joint resolution adopted by a vote of a majority of all the members of each house of the General Assembly. In all cases, the General Assembly shall give the Governor such notice as it may deem proper and shall allow him an opportunity to be heard before a joint session of

the General Assembly before it takes final action. When the General Assembly is not in session, the Council of State, a majority of its members concurring, may convene it in extra session for the purpose of proceeding under this paragraph.

(5) *Impeachment.* Removal of the Governor from office for any other cause shall be by impeachment.

**History.** — The provisions of this section are similar to those of Art. III, § 12, Const. 1868, as amended in 1962.

### CASE NOTES

**The Constitution provides for the succession of the Governor and the Lieutenant Governor** and does not authorize a vacancy in either office to be filled at an election for any portion of an unexpired term. Thomas v. State Bd. of Elections, 256 N.C. 401, 124 S.E.2d 164 (1962), decided under Art. III, § 12, Const. 1868.

**Governor May Not Appoint Successor to Lieutenant Governor.** — There is no constitutional provision which authorizes the Governor to appoint a successor to a deceased Lieutenant Governor to fill out a vacancy existing by reason of his death. Thomas v. State Bd. of Elections, 256 N.C. 401, 124 S.E.2d 164 (1962), decided under Art. III, § 12, Const. 1868.

## Sec. 4. Oath of office for Governor.

The Governor, before entering upon the duties of his office, shall, before any Justice of the Supreme Court, take an oath or affirmation that he will support the Constitution and laws of the United States and of the State of North Carolina, and that he will faithfully perform the duties pertaining to the office of Governor.

**History.** — The provisions of this section are similar to those of Art. III, § 4, Const. 1868.

**Legal Periodicals.** — For article, "Removing Local Elected Officials From Office in North Carolina," see 16 Wake Forest L. Rev. 547 (1980).

### CASE NOTES

**Cited** in Smith v. State, 298 N.C. 115, 257 S.E.2d 399 (1979).

## Sec. 5. Duties of Governor.

(1) *Residence.* The Governor shall reside at the seat of government of this State.

(2) *Information to General Assembly.* The Governor shall from time to time give the General Assembly information of the affairs of the State and recommend to their consideration such measures as he shall deem expedient.

(3) *Budget.* The Governor shall prepare and recommend to the General Assembly a comprehensive budget of the anticipated revenue and proposed expenditures of the State for the ensuing fiscal period. The budget as enacted by the General Assembly shall be administered by the Governor.

The total expenditures of the State for the fiscal period covered by the budget shall not exceed the total of receipts during that fiscal period and the surplus remaining in the State Treasury at the beginning of the period. To insure that the State does not incur a deficit for any fiscal period, the Governor shall continually survey the collection of the revenue and shall effect the necessary economies in State expenditures, after first making adequate provision for the prompt payment of the principal of and interest on bonds and notes of the State according to their terms, whenever he determines that receipts during the fiscal period, when added to any surplus remaining in the State Treasury at the beginning of the period, will not be sufficient to meet budgeted expenditures. This section shall not be construed to impair the power of the State to issue its bonds and notes within the limitations imposed in Article V of this Constitution, nor to impair the obligation of bonds and notes of the State now outstanding or issued hereafter.

(4) *Execution of laws.* The Governor shall take care that the laws be faithfully executed.

(5) *Commander in Chief.* The Governor shall be Commander in Chief of the military forces of the State except when they shall be called into the service of the United States.

(6) *Clemency.* The Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to regulations prescribed by law relative to the manner of applying for pardons. The terms reprieves, commutations, and pardons shall not include paroles.

(7) *Extra sessions.* The Governor may, on extraordinary occasions, by and with the advice of the Council of State, convene the General Assembly in extra session by his proclamation, stating therein the purpose or purposes for which they are thus convened.

(8) *Appointments.* The Governor shall nominate and by and with the advice and consent of a majority of the Senators appoint all officers whose appointments are not otherwise provided for.

(9) *Information.* The Governor may at any time require information in writing from the head of any administrative department or agency upon any subject relating to the duties of his office.

(10) *Administrative reorganization.* The General Assembly shall prescribe the functions, powers, and duties of the administrative departments and agencies of the State and may alter them from time to time, but the Governor may make such changes in the allocation of offices and agencies and in the allocation of those functions, powers, and duties as he considers necessary for efficient administration. If those changes affect existing law, they shall be set forth in executive orders, which shall be submitted to the General Assembly not later than the sixtieth calendar day of its session, and shall become effective and shall have the force of law upon adjournment sine die of the session, unless specifically disapproved by resolution of either house of the General Assembly or specifically modified by joint resolution of both houses of the General Assembly.

(11) *Reconvened sessions.* The Governor shall, when required by Section 22 of Article II of this Constitution, reconvene a session of the General Assembly. At such reconvened session, the General Assembly may only consider such bills as were returned by the Governor to that reconvened session for reconsideration. Such reconvened session shall begin on a date set by the Governor, but no later than 40 days after the General Assembly adjourned:

(a) For more than 30 days jointly as provided under Section 20 of Article II of this Constitution; or

(b) *Sine die.* If the date of reconvening the session occurs after the expiration of the terms of office of the members of the General Assembly, then the members serving for the reconvened session shall be the members for the succeeding term. (1969, c. 932, s. 1; 1977, c. 690, s. 1; 1995, c. 5, s. 2.)

**History.** — The provisions of subsections (1) and (2) of this section are similar to those of Art. III, § 5, Const. 1868.

The provisions of subsections (4) and (9) of this section are similar to those of Art. III, § 7, Const. 1868.

The provisions of subsection (5) of this section are similar to those of Art. III, § 8, Const. 1868.

The provisions of subsection (6) of this section are similar to those of Art. III, § 6, Const. 1868, as amended in 1872 — 1873 and 1954.

The provisions of subsection (7) of this section are similar to those of Art. III, § 9, Const. 1868.

The provisions of subsection (8) of this section are similar to those of Art. III, § 10, Const. 1868, as amended by the Convention of 1875.

**Editor's Note.** — The amendments to this section by Session Laws 1995, c. 5, s. 2, were submitted to the qualified voters at the general election held in November, 1996, and were approved at that election. Session Laws 1995, c. 5, s. 4, made this section effective January 1, 1997 upon certification; certification was made on November 26, 1996.

**Legal Periodicals.** — For article on punishment for crime in North Carolina, see 17 N.C.L. Rev. 205 (1939).

For a discussion of the Governor's power to appoint officers, see section in article entitled "A Study in Separation of Powers: Executive Power in North Carolina," 77 N.C.L. Rev. 2049 (1999).

For comment, "The States, Balanced Budgets, and Fundamental Shifts in Federalism," see 82 N.C.L. Rev. 1195 (2004).

## CASE NOTES

***Editor's Note.*** *— Many of the cases cited below were decided under corresponding provisions of the Constitution of 1868.*

**Duty of Governor to Execute Laws.** — The Governor, as the constituted head of the executive department, is charged with the duty of seeing that legislative acts are carried into effect. Winslow v. Morton, 118 N.C. 486, 24 S.E. 417 (1896).

**Construction.** — Because the North Carolina Public Records Law was enacted pursuant to the state's general policy that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law, and nothing in the Public Records Law refers to or specifically pertains to either pardons or clemency, it is not a law relative to the manner of applying for pardons under N.C. Const., Art. III, § 5(6). News & Observer Publ'g Co. v. Easley, 182 N.C. App. 14, 641 S.E.2d 698, 2007 N.C. App. LEXIS 490 (2007).

**An expenditure under subsection (3) occurs only when funds are disbursed.** Boneno v. State, 54 N.C. App. 690, 284 S.E.2d 170 (1981).

**The incurring of a contractual obligation does not constitute an expenditure** within the meaning of subsection (3). Boneno v. State, 54 N.C. App. 690, 284 S.E.2d 170 (1981).

**Budget Process.** — The Constitution mandates a three-step process with respect to the State's budget: (1) this section directs that the "Governor shall prepare and recommend to the General Assembly a comprehensive budget . . . for the ensuing fiscal period"; (2) N.C. Const., Art. II, vests in the General Assembly the power to enact a budget (one recommended by the Governor or one of its own making); and (3) after the General Assembly enacts a budget, this section then provides that the Governor shall administer the budget "as enacted by the General Assembly." In re Powers, 295 S.E.2d 589 (N.C. 1982).

N.C. Const. Art. III, § 5 details the duties of the Governor, requiring that he balance the budget. State Employees Ass'n of N.C., Inc. v. State, 154 N.C. App. 207, 573 S.E.2d 525, 2002 N.C. App. LEXIS 1451 (2002).

**Pardons Exclusive Prerogative of Governor.** — After a defendant has begun the service of his term, or at least when that takes place after the adjournment of the court, it is beyond the jurisdiction of the judge to alter the sentence or interfere with it in any way, as the power of pardon, parole or discharge during the term of imprisonment is by this section the exclusive prerogative of the Governor. State v. Lewis, 226 N.C. 249, 37 S.E.2d 691 (1946), decided before the 1954 amendment to Art. III, § 6, Const., 1868, which amendment terminated the Governor's power of parole.

**Power of General Assembly to Pass Amnesty Act.** — The power, granted by this section, to exercise clemency after conviction in some particular case and in favor of an individual especially charged with an offense is an executive act of a quasi-judicial kind, and does not conflict with or exclude the power of the General Assembly to pass an amnesty act in abolition or oblivion of the offense. State v. Bowman, 145 N.C. 452, 59 S.E. 74, 122 Am. St. R. 464 (1907).

**The Governor does not possess the constitutional power to parole.** State v. Allen, 346 N.C. 731, 488 S.E.2d 188 (1997).

**Conditional Pardon.** — The Governor may grant a pardon upon a condition precedent that the prisoner pay costs of trial, and upon condition subsequent, that he remain of good character, and be sober and industrious. In re Williams, 149 N.C. 436, 63 S.E. 108, 22 L.R.A. (n.s.) 238 (1908).

**Pardon While Appeal Pending.** — The term "conviction" in this section denotes a verdict of guilty rendered by a jury; therefore, when defendant, after verdict and judgment in the court below, appealed to the Supreme Court and, pending such appeal, was pardoned by the Governor, such pardon was authorized by this section and was valid. State v. Alexander, 76 N.C. 231 (1877); State v. Mathis, 109 N.C. 815, 13 S.E. 917 (1891).

**Commutation of Sentence.** — The exercise by the Governor of his judgment, resulting in the commutation of the sentence of one man convicted of murder or rape and the refusal to commute the sentence of another convicted of such crime, cannot be called "freakish" or "arbitrary" merely because another governor might, theoretically, have reached opposite conclusions. State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3205, 49 L. Ed. 2d 1206 (1976).

**Sentence Active in Part and Suspended in Part.** — It is not within the power of a court to impose a sentence active in part and suspended in part. Where a single offense is involved, the sentence must be made active in full or suspended in full. A split sentence is in effect an anticipatory pardon or parole, violative of the provisions of the Constitution of North Carolina appertaining to pardons and paroles. In re Powell, 241 N.C. 288, 84 S.E.2d 906 (1954).

**Power of Appointment.** — The Governor has the power to appoint an officer of the State with the advice and consent of a majority of the Senators, unless there is some other provision for the appointment. State ex rel. Martin v. Melott, 320 N.C. 518, 359 S.E.2d 783 (1987).

**Power of Appointment Under Constitution of 1868 — In General.** — Construing Art. III, § 10, Const. 1868, corresponding to subsection (8) of this section, which prior to 1875 authorized the Governor to appoint "all officers whose offices are established by this Constitution, which shall be created by law, and whose appointments are not otherwise provided for," and prohibited the General Assembly from appointing or electing such officers, along with cognate sections of the Constitution of 1868, in reference to vacancies, etc., prior to 1875, it was held in various decisions that the term, "unless otherwise provided for" meant unless otherwise provided for by the Constitution itself, and that, except in specified and restricted instances, the legislature had no power to appoint to office or to fill vacancies therein. State ex rel. Clark v. Stanley, 66 N.C. 59 (1872); People ex rel. Nichols v. McKee, 68 N.C. 429 (1873); People ex rel. Welker v. Bledsoe, 68 N.C. 457 (1873). And see Trustees of Univ. of N.C. v. McIver, 72 N.C. 76 (1875).

Article III, § 10, Const. 1868, as it then existed, and others of kindred nature, were altered by the Convention of 1875, which removed the express prohibition and the express grant of power to the Governor restricted to "all officers whose offices are established by this Constitution and whose offices are not otherwise provided for." And it became the accepted view that, in all offices created by statute, including the directorates of State institutions, the power of appointment, either original or to fill vacancies, was subject to legislative provision as expressed in a valid enactment. See State ex rel. Salisbury v. Croom, 167 N.C. 223, 83 S.E. 354 (1914); Cunningham v. Sprinkle, 124 N.C. 638, 33 S.E. 138 (1899); State ex rel. Cherry v. Burns, 124 N.C. 761, 33 S.E. 136 (1899).

**Same — Filling Vacancy and Appointing for Regular Term Distinguished.** — The Governor never nominates to the Senate to fill vacancies. He does that alone, in all cases. But where officers have to be appointed to fill a regular term, then he nominates to the Senate, unless it be an officer who is elected by the people, and then he never nominates to the Senate, but fills the vacancy or term by his own appointment (unless there is an officer holding over), until the people can elect. People ex rel. Battle v. McIver, 68 N.C. 467 (1873), decided under Art. III, § 10, Const. 1868, prior to the 1875 amendment.

**Same — Appointment by Governor Limited to Constitutional Officers.** — The inherent right of the Governor to appoint was restricted to constitutional offices and to where the Constitution of 1868 itself so provided. State ex rel. Salisbury v. Croom, 167 N.C. 223, 83 S.E. 354 (1914).

**Same — Power of Legislature to Fill Statutory Offices.** — The Convention of 1875 intended to alter the Constitution as interpreted in People ex rel. Nichols v. Mckee, 68 N.C. 429 (1873), and to confer upon the General Assembly the power to fill offices created by statute. State Prison v. Day, 124 N.C. 362, 32 S.E. 748 (1899), citing Ewart v. Jones, 116 N.C. 570, 21 S.E. 787 (1895). See also Osborne v. Town of Canton, 219 N.C. 139, 13 S.E.2d 265 (1941).

**Same — Transfer of Duties of Office.** — While the General Assembly has the power to abolish an office created by legislative authority, it cannot by mere transfer to others of the duties, connected with an institution, necessary and useful to the public, to be exercised by them, oust the incumbent from an office belonging to him under a contract with the State. State Prison v. Day, 124 N.C. 362, 32 S.E. 748 (1899).

**Appointment by Chief Justice of Supreme Court.** — It is not a violation of the separation of powers provision of the Constitution for the General Assembly to provide that the Chief Justice of the Supreme Court shall appoint the Director of the Office of Administrative Hearings. State ex rel. Martin v. Melott, 320 N.C. App. 518, 359 S.E.2d 783 (1987).

**Use of Pardoned Crime to Enhance or Sentence Improper.** — The reasoning that an increased punishment for a current offense due to a prior pardoned conviction is not punishment for the prior pardoned offense is a legal fiction that conflicts with logic and the administrative duties of the governor; thus, trial court infringed upon the prerogatives of the governor by finding that defendant's prior conviction constituted an aggravating factor. State v. Clifton, 125 N.C. App. 471, 481 S.E.2d 393 (1997), cert. granted, 346 N.C. 182, 486 S.E.2d 200 (1997), discretionary review improvidently allowed, 347 N.C. 391, 493 S.E.2d 56 (1997).

**Clemency Power may not be Delegated.** — As the exercise of the clemency power was the "exclusive prerogative" of the governor and could not be delegated, under the Rule of Necessity, even if a death row inmate's Woodard claims were cognizable by a court, the governor remained fully able to consider and resolve the inmate's clemency request. Bacon v. Lee, 353 N.C. 696, 549 S.E.2d 840, 2001 N.C. LEXIS 831 (2001).

**Public Release of Clemency Records.** — Subject matter jurisdiction existed over the question of whether the Governor was required to release certain records relating to applications for clemency pursuant to the North Carolina Public Records Law because resolving the relevant issues required the court to exercise its fundamental responsibility to determine the proper meaning of N.C. Const., Art. III, § 5(6); the case did not raise a political question by requiring the court to intrude upon the Governor's clemency powers, but only required the court to identify where to draw the line between the Executive Branch and the Legislature with respect to clemency, given the separation of powers doctrine. News & Observer Publ'g Co. v. Easley, 182 N.C. App. 14, 641 S.E.2d 698, 2007 N.C. App. LEXIS 490 (2007).

In resolving a dispute as to whether certain records pertaining to clemency were subject to the North Carolina Public Records Law, the court noted that neither G.S. 147-16(a)(1) nor G.S. 147-21 included any provision specifying whether the records involved in the statutes were considered public records; thus, the court was unable to determine that the General Assembly, in exercising its constitutional authority under N.C. Const., Art. III, § 5(6), intended to provide that the application process for pardons was subject to the Public Records Law. News & Observer Publ'g Co. v. Easley, 182 N.C. App. 14, 641 S.E.2d 698, 2007 N.C. App. LEXIS 490 (2007).

**Power to Prevent a Deficit.** — Governor's order directing the revenue secretary to halt expenditures for capital improvements, further reduce expenditures throughout state agencies, and withhold funds appropriated to local governments was authorized by N.C. Const., Art. III, § 5(3) to prevent a deficit, and did not violate the separation of powers doctrine; further N.C. Const., Art. V, § 5, which was directed at the general assembly, did not conflict with N.C. Const., Art. III, § 5. County of Cabarrus v. Tolson, 169 N.C. App. 636, 610 S.E.2d 443, 2005 N.C. App. LEXIS 615 (2005).

Avoidance of a constitutionally prohibited budget deficit was clearly an important public purpose; however, the escrow of a state employer's contribution to state employees' pension funds was not reasonable and necessary to achieve that purpose. Stone v. State, 191 N.C. App. 402, 664 S.E.2d 32, 2008 N.C. App. LEXIS 1485 (2008).

**Applied** in State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975).

**Cited** in Wilson v. North Carolina, 438 F.2d 284 (4th Cir. 1971); Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788 (1971); State v. Vert, 39 N.C. App. 26, 249 S.E.2d 476 (1978); In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979).

## Sec. 6. Duties of the Lieutenant Governor.

The Lieutenant Governor shall be President of the Senate, but shall have no vote unless the Senate is equally divided. He shall perform such additional duties as the General Assembly or the Governor may assign to him. He shall receive the compensation and allowances prescribed by law.

**History.** — The provisions of this section are similar to those of Art. III, § 11, Const. 1868, as amended in 1944.

## Sec. 7. Other elective officers.

(1) *Officers.* A Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Instruction, an Attorney General, a Commissioner of Agriculture, a Commissioner of Labor, and a Commissioner of Insurance shall be elected by the qualified voters of the State in 1972 and every four years thereafter, at the

same time and places as members of the General Assembly are elected. Their term of office shall be four years and shall commence on the first day of January next after their election and continue until their successors are elected and qualified.

(2) *Duties.* Their respective duties shall be prescribed by law.

(3) *Vacancies.* If the office of any of these officers is vacated by death, resignation, or otherwise, it shall be the duty of the Governor to appoint another to serve until his successor is elected and qualified. Every such vacancy shall be filled by election at the first election for members of the General Assembly that occurs more than 60 days after the vacancy has taken place, and the person chosen shall hold the office for the remainder of the unexpired term fixed in this Section. When a vacancy occurs in the office of any of the officers named in this Section and the term expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill the vacancy for the unexpired term of the office.

(4) *Interim officers.* Upon the occurrence of a vacancy in the office of any one of these officers for any of the causes stated in the preceding paragraph, the Governor may appoint an interim officer to perform the duties of that office until a person is appointed or elected pursuant to this Section to fill the vacancy and is qualified.

(5) *Acting officers.* During the physical or mental incapacity of any one of these officers to perform the duties of his office, as determined pursuant to this Section, the duties of his office shall be performed by an acting officer who shall be appointed by the Governor.

(6) *Determination of incapacity.* The General Assembly shall by law prescribe with respect to those officers, other than the Governor, whose offices are created by this Article, procedures for determining the physical or mental incapacity of any officer to perform the duties of his office, and for determining whether an officer who has been temporarily incapacitated has sufficiently recovered his physical or mental capacity to perform the duties of his office. Removal of those officers from office for any other cause shall be by impeachment.

(7) *Special Qualifications for Attorney General.* Only persons duly authorized to practice law in the courts of this State shall be eligible for appointment or election as Attorney General. (1983, c. 298, s. 1; 1985 (Reg. Sess., 1986), c. 920, s. 1.)

**Cross References.** — As to vacancies in office of Superintendent of Public Instruction, see G.S. 115C-18.

**History.** — The provisions of this section are similar to those of Art. III, § 1, Const. 1868, as amended in 1872-1873 and 1944, and Art. III, § 13, Const. 1868, as amended in 1872-1873, 1944, 1954 and 1962.

**Defeated Amendment Proposals.** — An amendment proposed by Session Laws 1981, c. 504, and defeated at the general election held in 1982, would have substituted "1980" for "1972" and "the Governor is" for "members of the General Assembly are" at the end of the first sentence of subsection (1) of this section and "statewide general election" for "election for members of the General Assembly" in subsection (3) near the beginning of the second sentence and near the end of the third sentence.

An amendment proposed by Session Laws 1985, c. 768, ss. 4, 5 and 9.1(1), and defeated at the primary election held on May 6, 1986, would have amended this section by substituting "1988, and in 1993 and every four years thereafter" for "1972 and every four years thereafter" in the first sentence of subsection (1), by adding "except in 1988 at the same time and places as members of the United States House of Representatives are elected" at the end of the first sentence of subsection (1), and by adding "except that the term of office of those elected in 1988 shall be for five years" at the end of subsection (1).

**Legal Periodicals.** — For article, "The Common Law Powers of the Attorney General of North Carolina," see 9 N.C. Cent. L.J. 1 (1977).

For article analyzing the scope of the North Carolina Insurance Commissioner's rate-making authority, see 61 N.C.L. Rev. 97 (1982).

For article, "Changes In the State's Law

Firm: The Powers, Duties and Operations of the Office of the Attorney General," see 12 Campbell L. Rev. 343 (1990).

### CASE NOTES

**Duty of Attorney General.** — The Attorney General of North Carolina is a constitutional officer, and he is required to take an oath which among other things binds him to "support, maintain and defend the Constitution of North Carolina not inconsistent with the Constitution of the United States ...." It is but a small step from the language of this oath to the proposition asserted by the Attorney General, that his duty includes the defense of statutes of this State against charges of unconstitutionality. Hendon v. North Carolina State Bd. of Elections, 633 F. Supp. 454 (W.D.N.C. 1986).

**Sole Discretion of Attorney General.** — In passing G.S. 114-11.6, the General Assembly made it clear that even upon a proper request and authorization by a district attorney, the Special Prosecution Division is to participate in criminal prosecutions only if the Attorney General, in his sole discretion as an independent constitutional officer, approves. Thus trial court exceeded its authority when it ordered that "the Attorney General's Office shall immediately assume the prosecution of" a capital case. State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991).

**Commissioner of Insurance.** — Although the office of Commissioner of Insurance is one created by this section, his power and authority emanate from the General Assembly and are limited by legislative prescription. The only power he has to fix rates is such power as the General Assembly has delegated to and vested in him. State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 61 N.C. App. 262, 300 S.E.2d 586, cert. denied, 308 N.C. 548, 304 S.E.2d 242 (1983).

**The Governor has the duty to supervise the official conduct of all executive officers.** Tice v. DOT, 67 N.C. App. 48, 312 S.E.2d 241 (1984).

**Vacancies Filled by Appointment until Election.** — In each of the offices named in this section in which a vacancy is required to be filled, the duty is imposed upon the Governor to appoint another to fill the office until a successor is elected and qualified. Thomas v. State Bd. of Elections, 256 N.C. 401, 124 S.E.2d 164 (1962), decided under former Art. III, § 13, Const. 1868, as amended.

**No Election of Successor to Lieutenant Governor.** — If it had been the intent of the framers of the Constitution to authorize or require the election of a successor to fill a vacancy in the office of Lieutenant Governor, as required with respect to the offices named in this section, then there is no sound reason why the framers of the Constitution did not include the office of Lieutenant Governor in this section. Thomas v. State Bd. of Elections, 256 N.C. 401, 124 S.E.2d 164 (1962), decided under former Art. III, § 13, Const. 1868, as amended.

**Applied** in State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Admin. Office, 287 N.C. 192, 214 S.E.2d 98 (1975); Martin v. Thornburg, 320 N.C. 533, 359 S.E.2d 472 (1987).

**Cited** in Nash County Bd. of Educ. v. Biltmore Co., 464 F. Supp. 1027 (E.D.N.C. 1978); State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980); North Carolina ex rel. Long v. Alexander & Alexander Servs., Inc., 711 F. Supp. 257 (E.D.N.C. 1989); Bailey v. North Carolina Dep't of Revenue, 353 N.C. 142, 540 S.E.2d 313, 2000 N.C. LEXIS 896 (2000); State v. Sexton, 352 N.C. 336, 532 S.E.2d 179, 2000 N.C. LEXIS 529 (2000); North Carolina ex rel. Long v. Blackburn, 492 F. Supp. 2d 525, 2007 U.S. Dist. LEXIS 47588 (E.D.N.C. 2007).

## Sec. 8. Council of State.

The Council of State shall consist of the officers whose offices are established by this Article.

**History.** — The provisions of this section are similar to those of Art. III, § 14, Const. 1868, as amended in 1872 — 1873 and 1944.

### OPINIONS OF ATTORNEY GENERAL

**Delegation of Power to Attend Meetings.** — Those members of the Council of State who have statutory authority to delegate duties may, in conformity with such statutes, attend and vote at meetings of Boards of which they are ex officio members through delegates or designated subordinates. The remaining members of the Council of State may make similar delegations or designations where, in the member's judgment, other duties necessitate his absence and the statute creating his ex officio membership does not express or clearly imply an intent of the General Assembly that the powers of such membership be exercised personally. See opinion of Attorney General to the honorable James E. Long, Commissioner of Insurance, 55 N.C.A.G. 116 (1986).

## Sec. 9. Compensation and allowances.

The officers whose offices are established by this Article shall at stated periods receive the compensation and allowances prescribed by law, which shall not be diminished during the time for which they have been chosen.

**History.** — The provisions of this section are similar to those of Art. III, § 15, Const. 1868, as amended in 1962.

## Sec. 10. Seal of State.

There shall be a seal of the State, which shall be kept by the Governor and used by him as occasion may require, and shall be called "The Great Seal of the State of North Carolina". All grants and commissions shall be issued in the name and by the authority of the State of North Carolina, sealed with "The Great Seal of the State of North Carolina", and signed by the Governor.

**History.** — The provisions of this section are similar to those of Art. III, § 16, Const. 1868.

## Sec. 11. Administrative departments.

Not later than July 1, 1975, all administrative departments, agencies, and offices of the State and their respective functions, powers, and duties shall be allocated by law among and within not more than 25 principal administrative departments so as to group them as far as practicable according to major purposes. Regulatory, quasi-judicial, and temporary agencies may, but need not, be allocated within a principal department. (1969, c. 932, s. 1.)

**Editor's Note.** — This section was added by amendment adopted by vote of the people at the general election held Nov. 3, 1970. The amendment was effective July 1, 1971.

### CASE NOTES

**Code of Judicial Conduct Not Applicable to Administrative Law Judges.** — North Carolina Administrative Procedure Act, G.S. 150B-1 et seq., does not adopt the North Carolina Code of Judicial Conduct, which governs General Court of Justice of North Carolina proceedings and communications among the parties, because administrative agencies and departments exist pursuant to N.C. Const., Art. III, § 11, and as such are part of the Executive Branch of the State of North Carolina's government. Mission Hosps., Inc. v. N.C. HHS, 189 N.C. App. 263, 658 S.E.2d 277, 2008 N.C. App. LEXIS 548 (2008).

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**For definition of "administrative departments, agencies and offices of the state,"** see opinion of Attorney General to Senator John T. Henley, State Government Reorganization Study, 40 N.C.A.G. 738 (1970).

# ARTICLE IV

# JUDICIAL

## Section 1. Judicial power.

The judicial power of the State shall, except as provided in Section 3 of this Article, be vested in a Court for the Trial of Impeachments and in a General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.

**Cross References.** — As to the judicial department, see G.S. 7A-1 et seq.

**History.** — The provisions of this section are similar to those of Art. IV, § 1, Const. 1868, as that article was rewritten in 1962.

**Legal Periodicals.** — For comment on court reform under the 1962 amendment to Art. IV of the Constitution of 1868, see 42 N.C.L. Rev. 858 (1964).

For note on judicial review and separation of powers, see 45 N.C.L. Rev. 467 (1967).

For note analyzing possible constitutional barriers to judicial abrogation of contractual governmental immunity, see 12 Wake Forest L. Rev. 1082 (1976).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1067 (1981).

### CASE NOTES

**Judicial Power Vested in General Court of Justice.** — The primary purpose of the 1962 amendment, which rewrote Art. IV of the Constitution of 1868, was to establish "a unified judicial system." To accomplish this result, all judicial power, except that vested in a court for the trial of impeachments and in administrative agencies, is now vested by the Constitution in the General Court of Justice. State v. Matthews, 270 N.C. 35, 153 S.E.2d 791 (1967), decided under former Art. IV, Const. 1868, as rewritten in 1962.

The judicial power of this state is "vested in a Court for the Trial of Impeachments and a General Court of Justice," and the latter constitutes "a unified judicial system for purposes of jurisdiction, operation, and administration," and includes a Superior Court Division. In re Alamance County Ct. Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991).

**Limitation on Power of General Assembly to Establish Courts.** — The last clause of the former section, providing that the General Assembly shall have no power to "establish or authorize any courts other than as permitted by this article," was entirely new with the 1962 amendment to Art. IV of the Constitution of 1868. State v. Matthews, 270 N.C. 35, 153 S.E.2d 791 (1967), decided under former Art. IV, Const. 1868, as rewritten in 1962.

**The General Assembly shall have no power to deprive the judicial department** of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government. In re Alamance County Ct. Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991).

**Reconciliation with Need for Administrative Expertise.** — A major purpose of N.C. Const., Art. IV, § 3, is to reconcile the retention of judicial power in the judicial branch required by this section, with the recognized need to utilize administrative expertise in implementing complicated regulatory schemes such as the Sedimentation Pollution Control Act. In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 92 N.C. App. 1, 373 S.E.2d 572 (1988), rev'd on other grounds, 324 N.C. 373, 379 S.E.2d 30 (1989).

**Limitation on Power of Legislature to Alter Judicial Result.** — The doctrine of separation of powers precludes the legislature from enacting a statute which alters a result obtained by a final judicial decision before the date of the statute's enactment. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

**Constitution Shields Judicial Branch from Legislative Interference So Far as Its Inherent Rights and Powers.** — Pursuant to N.C. Const. art. I, § 6 and N.C. Const. art. IV, § 1, the North Carolina Constitution shields the judicial branch from legislative interference, so far at least as its inherent rights and powers are concerned. Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004).

**The inherent power of the Supreme Court has not been limited by the Consti-**

**tution;** on the contrary, the Constitution protects such power. Beard v. North Carolina State Bar, 320 N.C. 126, 357 S.E.2d 694 (1987).

**The existence of inherent judicial power is not dependent upon legislative action;** the General Assembly has recognized the existence of the inherent power of the court and cannot abridge that power. Beard v. North Carolina State Bar, 320 N.C. 126, 357 S.E.2d 694 (1987).

**When the jurisdiction of a particular court is constitutionally defined,** the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the Constitution. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The principle that when the jurisdiction of a particular court is constitutionally defined the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the Constitution is grounded on the separation of powers provisions found in many American Constitutions, including the Constitution of this State. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976); Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

A legislative declaration may not be given effect so as to alter or amend a final exercise of the courts' rightful jurisdiction. Gardner v. Gardner, 300 N.C. 715, 268 S.E.2d 468 (1980).

The General Assembly has no authority to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a coordinate department of the government. Beard v. North Carolina State Bar, 320 N.C. 126, 357 S.E.2d 694 (1987).

**The General Assembly is without authority to expand the appellate jurisdiction of the Supreme Court** beyond the limits set in the Constitution. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

**The Supreme Court has no original jurisdiction over claims against the State,** and the General Assembly has no authority to confer such jurisdiction upon it. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

**Appeal to Supreme Court from Administrative Decisions.** — The General Assembly has no authority to provide for appeal from decisions of administrative agencies to the Supreme Court without prior appeal to and review by a lower court within the General Court of Justice. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

**General Assembly May Not Confer Judicial Power on Police Officer.** — A police officer is neither an official of the General Court of Justice, nor an administrative agency within the meaning of Art. IV, § 3, Const. 1868; hence the General Assembly lacks constitutional authority to confer judicial power upon a police officer. State v. Matthews, 270 N.C. 35, 153 S.E.2d 791 (1967), decided under former Art. IV, Const. 1868, as rewritten in 1962.

Former G.S. 160-20.1 and Session Laws 1963, c. 1093, purporting to confer judicial powers on police "desk officers" who were not officers of the General Court of Justice and who were not vested with judicial power on November 6, 1962, were unconstitutional and void. State v. Matthews, 270 N.C. 35, 153 S.E.2d 791 (1967), decided under former Art. IV, Const. 1868, as rewritten in 1962.

**Thus Police Officer May Not Authorize Issuance of Warrant.** — The General Assembly cannot confer upon a police officer judicial power sufficient to authorize the issuance of a valid warrant under any circumstances, even where the complainant is a private citizen and has no connection with any law-enforcement agency. State v. Matthews, 270 N.C. 35, 153 S.E.2d 791 (1967), decided under former Art. IV, Const. 1868, as rewritten in 1962.

**Judicial Review of Acts of General Assembly.** — The courts of this State have no inherent power to review acts of the General Assembly and to declare invalid those which the courts disapprove, or, upon their own initiative, find to be in conflict with the Constitution. Green v. Eure, 27 N.C. App. 605, 220 S.E.2d 102 (1975), cert. denied, 289 N.C. 297, 222 S.E.2d 696 (1976).

While plaintiffs could not obtain judicial review under G.S. 150A-43 (now G.S. 150B-43) of their claim that G.S. 143B-350(f)(8), conferring on the State Board of Transportation the power and duty to approve all highway construction programs, unconstitutionally delegates legislative power to the board, since the claim involves no agency "decision", such claim could be heard pursuant to this section. Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina Dep't of Transp., 46 N.C. App. 350, 265 S.E.2d 890 (1980).

**Three-Judge Panel for Redistricting Challenges Does Not Infringe on Chief Justice's Authority.** — Three-judge panel of superior court judges required by G.S. 1-267.1 is not a new court outside of the contemplation of N.C. Const. art. IV, §§ 12 and 13(2), as a challenge to redistricting is a matter of procedure that lies within the purview of the General Assembly; accordingly, no new courts are created beyond those contemplated by N.C. Const. art. IV, §§ 1, 2. Stephenson v. Bartlett, 358 N.C. 219, 595 S.E.2d 112 (2004).

**Judicial Power to Require Officials to Act in Compliance with Duties.** — The courts of this State have the power, pursuant to this section, to issue in personam orders requiring public officials to act in compliance with their ministerial or nondiscretionary public duties. Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina Dep't of Transp., 46 N.C. App. 350, 265 S.E.2d 890 (1980).

**In Personam Orders.** — By virtue of their being "a co-ordinate department of the government," courts of this state are empowered "to issue in personam orders requiring public officials to act in compliance with their ... public duties." In re Alamance County Ct. Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991).

**Judicial Functions in Criminal Cases.** — The functions of the court in regard to the punishment of crimes are to determine the guilt or innocence of the accused, and, if that determination be one of guilt, then to pronounce the punishment or penalty prescribed by law. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

**Grant of Discretionary Parole Power.** — Former G.S. 148-62, insofar as it granted discretionary power to the Board of Paroles (now the Parole Commission), was not an assignment of judicial power to the Board in contravention of this section and N.C. Const., Art. I, § 6. Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788, aff'd, 279 N.C. 556, 184 S.E.2d 259 (1971).

The granting of parole and the supervision of parolees are purely administrative functions, and accordingly may be entrusted by the legislature to nonjudicial agencies. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

**The order of the Supreme Court establishing the Client Security Fund and requiring annual payments by attorneys to the fund** was essential corollary to the court's function, was required for the proper administration of justice, and did not violate the Constitution. Beard v. North Carolina State Bar, 320 N.C. 126, 357 S.E.2d 694 (1987).

**Assessment of Penalty Held Unconstitutional.** — Where the DMV assessed a penalty for operating a vehicle on the highways with a gross weight in excess of that allowed under the license obtained pursuant to G.S. 20-96, but not in excess of the maximum axle weight limits, and such penalty was not authorized by G.S. 20-118, such penalty violated this section and N.C. Const., Art. IV, § 3, since there was no reasonable necessity for conferring absolute judicial discretion in the DMV. Young's Sheet Metal & Roofing, Inc. v. Wilkins, 77 N.C. App. 180, 334 S.E.2d 419 (1985), cert. denied and appeal dismissed, 316 N.C. 202, 341 S.E.2d 574 (1986), decided prior to the 1985 amendment to G.S. 20-96.

**Undergraduate Court's powers are not derivative of the North Carolina judiciary system** nor are they limited by the safeguards protecting a citizen in the state court system; thus, the undergraduate court could not be categorized as a "court" and the proceedings are not required to be open to the public. DTH Publishing Corp. v. University of N.C., 128 N.C. App. 534, 496 S.E.2d 8 (1998), cert. denied, 348 N.C. 496, 510 S.E.2d 382 (1998).

**Indigent Defense Services Act and the Office of Indigent Defense Services violated the state constitution's separation of powers principles;** appointing and compensating attorneys for indigent criminals was not committed to any one state government branch. Ivarsson v. Office of Indigent Def. Servs., 156 N.C. App. 628, 577 S.E.2d 650, 2003 N.C. App. LEXIS 208 (2003), cert. denied, 357 N.C. 250, 582 S.E.2d 269 (2003).

**Division of Motor Vehicle's Action Violated Separation of Powers Doctrine.** — North Carolina Division of Motor Vehicles violated the separation of powers clause in the North Carolina Constitution and violated a driver's right to due process when it unilaterally voided a district court ordered limited driving privilege to a driver; furthermore, by allowing the North Carolina Division of Motor Vehicles to, in essence, invalidate a properly entered court order, G.S. 20-179.3(k), it violated the provisions requiring separation of powers contained in N.C. Const. art. I, § 6; N.C. Const. art. IV, § 1; and N.C. Const. art. IV, § 3. State v. Bowes, 159 N.C. App. 18, 583 S.E.2d 294, 2003 N.C. App. LEXIS 1439 (2003), cert. denied, 358 N.C. 156, 592 S.E.2d 698 (2004).

**Because the General Assembly did not intend, in passing G.S. 105-113.4C, to retroactively limit the procedures and standard for review governing the question of diligent enforcement of an escrow statute,** a business court's order compelling arbitration does not violate the separation of powers doctrine in N.C. Const., Art. I, § 6; Art. II, §§ 1 and 20; and Art. IV, § 1. State v. Philip Morris USA, Inc., — N.C. App. —, 666 S.E.2d 783, 2008 N.C. App. LEXIS 1757 (2008).

**Applied** in Gardner v. Gardner, 48 N.C. App. 38, 269 S.E.2d 630 (1980); Dixon v. Peters, 63 N.C. App. 592, 306 S.E.2d 477 (1983).

**Cited** in Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier, 16 N.C. App. 381, 192 S.E.2d 57 (1972); In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978); Balcon, Inc. v. Sadler, 36 N.C. App. 322, 244 S.E.2d 164 (1978); In re Watts, 38 N.C. App. 90, 247 S.E.2d 427 (1978); In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979); State ex rel. Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79 (1982); In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 324 N.C. 373, 379 S.E.2d 30 (1989); In re Spivey, 345 N.C. 404, 480 S.E.2d 693 (1997); Peace v. Employment Sec. Comm'n, 349 N.C. 315, 507 S.E.2d 272 (1998); In re Will of Buck, 350 N.C. 612, 516 S.E.2d 858 (1999); In re Azalea Garden Bd. & Care, Inc., 140 N.C. App. 45, 535 S.E.2d 388, 2000 N.C. App. LEXIS 1094 (2000).

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**Delay of Rules by Review Commission.** — An act vesting in the Administrative Rules Review Commission (ARRC), a commission appointed by the General Assembly, the power to delay indefinitely the effective date of duly adopted agency rules which it deems in excess of statutory authority would likely be held to violate this section by vesting the ARRC with judicial powers reserved to the court and with supreme legislative powers reserved to the General Assembly. See opinion of Attorney General to Henson P. Barnes, President Pro Tempore, Senate, 60 N.C.A.G. 70 (1991).

## Sec. 2. General Court of Justice.

The General Court of Justice shall constitute a unified judicial system for purposes of jurisdiction, operation, and administration, and shall consist of an Appellate Division, a Superior Court Division, and a District Court Division.

**History.** — The provisions of this section are similar to those of Art. IV, § 2, Const. 1868, as that article was rewritten in 1962.

**Legal Periodicals.** — For article, "Constitutional Rights of Students, Their Families, and Teachers in the Public Schools," see 10 Campbell L. Rev. 353 (1988).

CASE NOTES

**Courts Constituting General Court of Justice.** — The General Court of Justice consists exclusively of the courts constituting the appellate, superior court and district court divisions thereof. State v. Matthews, 270 N.C. 35, 153 S.E.2d 791 (1967), decided under former Art. IV, Const. 1868, as rewritten in 1962.

**Police officer is not an official of the General Court of Justice.** State v. Matthews, 270 N.C. 35, 153 S.E.2d 791 (1967), decided under former Art. IV, Const. 1868, as rewritten in 1962.

**The superior court is a court of general jurisdiction** and has jurisdiction in all actions for personal injuries caused by negligence, except where its jurisdiction is divested by statute. Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970), decided under former Art. IV, Const. 1868, as rewritten in 1962.

**Three-Judge Panel for Redistricting Challenges Held Constitutional.** — Three-judge panel of superior court judges required by G.S. 1-267.1 is not a new court outside of the contemplation of N.C. Const. art. IV, §§ 12 and 13(2), as a challenge to redistricting is a matter of procedure that lies within the purview of the General Assembly; accordingly, no new courts are created beyond those contemplated by N.C. Const. art. IV, §§ 1, 2. Stephenson v. Bartlett, 358 N.C. 219, 595 S.E.2d 112 (2004).

**Applied** in Gentry v. Uniform Judicial Retirement Sys., 378 F. Supp. 1 (M.D.N.C. 1974).

**Cited** in Balcon, Inc. v. Sadler, 36 N.C. App. 322, 244 S.E.2d 164 (1978); State v. Pennington, 327 N.C. 89, 393 S.E.2d 847 (1990); Ocean Hill Joint Venture v. North Carolina Dep't of Environment, Health & Natural Resources, 333 N.C. 318, 426 S.E.2d 274 (1993).

## Sec. 3. Judicial powers of administrative agencies.

The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created. Appeals from administrative agencies shall be to the General Court of Justice.

**History.** — The provisions of this section are similar to those of Art. IV, § 3, Const. 1868, as that article was rewritten in 1962.

**Legal Periodicals.** — For article, "Advisory Rulings by Administrative Agencies: Their Benefits and Dangers," see 2 Campbell L. Rev. 1 (1980).

## CASE NOTES

**Purpose.** — A major purpose of this section is to reconcile the retention of judicial power in the judicial branch required by N.C. Const., Art. IV, § 1, with the recognized need to utilize administrative expertise in implementing complicated regulatory schemes such as the Sedimentation Pollution Control Act. In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 92 N.C. App. 1, 373 S.E.2d 572 (1988), rev'd on other grounds, 324 N.C. 373, 379 S.E.2d 30 (1989).

**The application of this section requires three questions be answered:** (1) For what purposes was the agency created?, (2) which peculiarly "judicial" power has the General Assembly attempted to vest in the agency?, and (3) is the Legislature's grant of such judicial power reasonably necessary as an incident to the accomplishment of the purposes for which the agency was created? In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 92 N.C. App. 1, 373 S.E.2d 572 (1988), rev'd on other grounds, 324 N.C. 373, 379 S.E.2d 30 (1989).

**Considerations Irrelevant to Determination of Whether Judicial Power Properly Conferred.** — Considerations such as the maximum size of the civil penalty and the availability of alternative enforcement sanctions are irrelevant to the question of whether a civil penalty is a peculiarly "judicial" power reasonably necessary to the accomplishment of an agency's purposes; since the judiciary does not possess the power to enact specific civil penalties or other alternative enforcement sanctions, these legislative choices are not at issue in determining whether the Legislature has usurped a judicial power which may not be conferred under this section. In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 92 N.C. App. 1, 373 S.E.2d 572 (1988), rev'd on other grounds, 324 N.C. 373, 379 S.E.2d 30 (1989).

**Limitation on Power of Legislature to Alter Judicial Result.** — The doctrine of separation of powers precludes the legislature from enacting a statute which alters a result obtained by final judicial decision before the date of the statute's enactment. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

**Presumption of Propriety in Official Acts.** — There is a rebuttable presumption that an administrative agency has properly performed its official duties; while arbitrary and capricious agency action is itself prohibited by federal and state due process, any assertion of arbitrary agency action does not necessarily require the agency's action be reviewed for compliance with every other requirement under the State and federal Constitutions. In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 92 N.C. App. 1, 373 S.E.2d 572 (1988), rev'd on other grounds, 324 N.C. 373, 379 S.E.2d 30 (1989).

**This section does not prohibit the legislature from conferring the power on administrative agencies to assess civil penalties.** In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 324 N.C. 373, 379 S.E.2d 30 (1989).

**Agencies Are Not Courts.** — Administrative agencies referred to in this section ex vi termini are distinguished from courts. They are not constituent parts of the General Court of Justice. State ex rel. N.C. Utils. Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 142 S.E.2d 8 (1965), decided under former Art. IV, Const. 1868, as amended in 1962.

Even though superior court's order of consecutive sentencing was contrary to law, the Department of Corrections could not alter that order by refusing to change defendant's records to reflect concurrent sentencing without violating the separation of powers doctrine under N.C. Const. art. I, § 6; the order was entered under the superior court's exclusive, original jurisdiction over all criminal actions under G.S. 7A-271(a), and was therefore a voidable, not a void, judgment, and the Department, as a part of the executive branch, was bound to honor the judgment until it was corrected or vacated. State v. Ellis, 167 N.C. App. 276, 605 S.E.2d 168, 2004 N.C. App. LEXIS 2161 (2004), rev'd 361 N.C. 200, 639 S.E.2d 425 (2007) (remanded to allow defendant to withdraw his guilty plea).

**A police officer is not an administrative agency** within the meaning of this section. State v. Matthews, 270 N.C. 35, 153 S.E.2d 791 (1967), decided under former Art. IV, Const. 1868, as amended in 1962.

**Attempted grant to the Commissioner of Insurance of judicial power** to impose a penalty upon an insurance agent for a violation of the insurance laws, varying in the Commissioner's discretion from a nominal sum to $25,000, violated this section, there being no reasonable necessity for conferring such judicial power upon the Commissioner. State ex rel. Lanier v. Vines, 274 N.C. 486, 164 S.E.2d 161 (1968), decided under former Art. IV, Const. 1868, as amended in 1962.

**Civil Penalty Power Was Necessary to Accomplish Agency's Purpose.** — This section contemplates that discretionary judicial authority may be granted to an agency when reasonably necessary to accomplish the agency's purposes; civil penalty power was reasonably necessary to the purposes for which North Carolina Department of Natural Resources and Community Development (NRCD) (now the Department of Environment and Natural Resources) was established. In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 324 N.C. 373, 379 S.E.2d 30 (1989).

**This section does not prohibit the legislature from conferring on administrative agencies the power to exercise discretion in determining civil penalties within an authorized range,** provided that adequate guiding standards accompany that discretion. In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 324 N.C. 373, 379 S.E.2d 30 (1989).

**Assessment of Civil Penalties Must Be Reasonably Necessary.** — Administrative agencies are not constitutionally barred from assessing civil penalties. All administrative civil penalties are not per se in violation of the State Constitution, rather, the granting of the judicial power to assess a civil penalty must be "reasonably necessary" to the purposes for which the agency was created and with appropriate guidelines for the exercise of the discretion. North Carolina Private Protective Servs. Bd. v. Gray, Inc., 87 N.C. App. 143, 360 S.E.2d 135 (1987).

**Assessment of Penalty Held Constitutional.** — The authority of the Private Protective Services Board under subsection (c) of G.S. 74C-17 to assess a civil penalty of up to two thousand dollars ($2,000) in lieu of revocation or suspension of a license is not an unconstitutional attempt to confer a judicial power on a state agency; the provision authorizing civil penalties is reasonably necessary to the Board in fulfilling its duties to require that those who hold themselves out as providing private protective services to citizens must meet high standards of training and professionalism. North Carolina Private Protective Servs. Bd. v. Gray, Inc., 87 N.C. App. 143, 360 S.E.2d 135 (1987).

This section did not prohibit the legislature from conferring on the North Carolina Department of Natural Resources and Community Development (NRCD) (now the Department of Environment and Natural Resources) the power to exercise discretion in determining civil penalties within an authorized range; plenary guiding standards existed to check the exercise of NRCD discretion in its assessment of civil penalties in varying amounts, commensurate with the seriousness of the violations of the Sedimentation Pollution Control Act. In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 324 N.C. 373, 379 S.E.2d 30 (1989).

**Assessment of Penalty Held Unconstitutional.** — Where the DMV assessed a penalty for operating a vehicle on the highways with a gross weight in excess of that allowed under the license obtained pursuant to G.S. 20-96, but not in excess of the maximum axle weight limits, and such penalty was not authorized by G.S. 20-118, such penalty violated N.C. Const., Art. IV, § 1 and this section since there was no reasonable necessity for conferring absolute judicial discretion in the DMV. Young's Sheet Metal & Roofing, Inc. v. Wilkins, 77 N.C. App. 180, 334 S.E.2d 419 (1985), cert. denied and appeal dismissed, 316 N.C. 202, 341 S.E.2d 574 (1986), decided prior to the 1985 amendment to G.S. 20-96.

The Department of Natural Resources and Community Development's (now the Department of Environment and Natural Resources) assessment of a civil penalty under G.S. 113A-64 arose from an unconstitutional transfer of judicial power under this section, which required the penalty be vacated. In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 92 N.C. App. 1, 373 S.E.2d 572, supersedeas allowed on reconsideration, 323 N.C. 625, 374 S.E.2d 873 (1988).

**Undergraduate Court's powers are not derivative of the North Carolina judiciary system** nor are they limited by the safeguards protecting a citizen in the state court system; thus, the undergraduate court could not be categorized as a "court" and the proceedings are not required to be open to the public. DTH Publishing Corp. v. University of N.C., 128 N.C. App. 534, 496 S.E.2d 8 (1998), cert. denied, 348 N.C. 496, 510 S.E.2d 382 (1998).

**Division of Motor Vehicle's Action Violated Separation of Powers Doctrine.** — North Carolina Division of Motor Vehicles violated the separation of powers clause in the North Carolina Constitution and violated a driver's right to due process when it unilaterally voided a district court ordered limited driving privilege to a driver; furthermore, by allowing the North Carolina Division of Motor Vehicles to, in essence, invalidate a properly entered court order, G.S. 20-179.3(k), it violated the provisions requiring separation of powers contained in N.C. Const. art. I, § 6; N.C. Const. art. IV, § 1; and N.C. Const. art. IV, § 3. State v. Bowes, 159 N.C. App. 18, 583 S.E.2d 294, 2003 N.C. App. LEXIS 1439 (2003), cert. denied, 358 N.C. 156, 592 S.E.2d 698 (2004).

**Applied** in Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier, 16 N.C. App. 381, 192 S.E.2d 57 (1972).

**Cited** in Ocean Hill Joint Venture v. North Carolina Dep't of Environment, Health & Natural Resources, 333 N.C. 318, 426 S.E.2d 274 (1993); Mullins v. North Carolina Criminal Justice Educ. & Training Stds. Comm'n, 125 N.C. App. 339, 481 S.E.2d 297 (1997); Peace v. Employment Sec. Comm'n, 349 N.C. 315, 507

S.E.2d 272 (1998); State ex rel. Utils. Comm'n v. Town of Kill Devil Hills, — N.C. App. —, 670 S.E.2d 341, 2009 N.C. App. LEXIS 4 (2009).

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**Delay of Rules by Review Commission.** — An act vesting in the Administrative Rules Review Commission (ARRC), a commission appointed by the General Assembly, the power to delay indefinitely the effective date of duly adopted agency rules which it deems in excess of statutory authority would likely be held to violate this section by vesting the ARRC with judicial powers reserved to the court and with supreme legislative powers reserved to the General Assembly. See opinion of Attorney General to Henson P. Barnes, President Pro Tempore, Senate, 60 N.C.A.G. 70 (February 25, 1991).

## Sec. 4. Court for the Trial of Impeachments.

The House of Representatives solely shall have the power of impeaching. The Court for the Trial of Impeachments shall be the Senate. When the Governor or Lieutenant Governor is impeached, the Chief Justice shall preside over the Court. A majority of the members shall be necessary to a quorum, and no person shall be convicted without the concurrence of two-thirds of the Senators present. Judgment upon conviction shall not extend beyond removal from and disqualification to hold office in this State, but the party shall be liable to indictment and punishment according to law.

**History.** — The provisions of this section are similar to those of Art. IV, § 4, Const. 1868, as that article was rewritten in 1962.

CASE NOTES

**Impeachment of District Attorneys Not Proper.** — The statutory listing in G.S. 123-5 is exclusive and does not allow for impeachment of district attorneys. In re Spivey, 345 N.C. 404, 480 S.E.2d 693 (1997).

**Cited** in In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978).

## Sec. 5. Appellate division.

The Appellate Division of the General Court of Justice shall consist of the Supreme Court and the Court of Appeals.

**Cross References.** — As to the Supreme Court, see G.S. 7A-10 et seq. As to the Court of Appeals, see G.S. 7A-16, et seq.

**History.** — The provisions of this section are similar to those of Art. IV, § 5, Const. 1868, as that article was rewritten in 1962 and as amended in 1965.

CASE NOTES

**Applied** in Early v. County of Durham, Dep't of Soc. Servs., — N.C. App. —, 667 S.E.2d 512, 2008 N.C. App. LEXIS 1818 (2008).

## Sec. 6. Supreme Court.

(1) *Membership.* The Supreme Court shall consist of a Chief Justice and six Associate Justices, but the General Assembly may increase the number of Associate Justices to not more than eight. In the event the Chief Justice is

unable, on account of absence or temporary incapacity, to perform any of the duties placed upon him, the senior Associate Justice available may discharge those duties.

(2) *Sessions of the Supreme Court.* The sessions of the Supreme Court shall be held in the City of Raleigh unless otherwise provided by the General Assembly.

**History.** — The provisions of this section are similar to those of Art. IV, § 6, Const. 1868, as that article was rewritten in 1962.

## Sec. 7. Court of Appeals.

The structure, organization, and composition of the Court of Appeals shall be determined by the General Assembly. The Court shall have not less than five members, and may be authorized to sit in divisions, or other than en banc. Sessions of the Court shall be held at such times and places as the General Assembly may prescribe.

**History.** — The provisions of this section are similar to those of Art. IV, § 6A, Const. 1868, as added in 1966.

**Legal Periodicals.** — For article, "Why the North Carolina Court of Appeals Should Have a Procedure for Sitting En Banc," see 75 N.C.L. Rev. 1981 (1997).

### CASE NOTES

**Cited** in In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

## Sec. 8. Retirement of Justices and Judges.

The General Assembly shall provide by general law for the retirement of Justices and Judges of the General Court of Justice, and may provide for the temporary recall of any retired Justice or Judge to serve on the court or courts of the division from which he was retired. The General Assembly shall also prescribe maximum age limits for service as a Justice or Judge. (1971, c. 451, s. 1; 1981, c. 513, s. 1.)

**History.** — This section is new with the Constitution of 1970.

**Legal Periodicals.** — For note entitled, "Gregory v. Ashcroft: The Plain Statement Rule and Judicial Supervision of Federal-State Relations," see 70 N.C.L. Rev. 1563 (1992).

### CASE NOTES

**Intent of Amendment.** — The language employed in the amendment to this section is a clear indication of the people's intent to empower the legislature to interrupt judicial terms of office with an age limit on active service. Martin v. State, 330 N.C. 412, 410 S.E.2d 474 (1991).

**Interpretation of "For Service."** — The words, "for service," as used in the amendment to this section refers exclusively to the time during which an individual justice or judge is eligible to serve notwithstanding the length of his or her term of office. The words, "for service," as used in this section therefore, evince an intent to empower the legislature to render particular justices or judges ineligible for active service because of age notwithstanding that time may remain in their terms of office. Martin v. State, 330 N.C. 412, 410 S.E.2d 474 (1991).

**Denial of Compensation to Judge Removed from Office for Wrongdoing.** — The General Assembly acted well within its constitutional authority under this section when it provided in G.S. 7A-376 that a judge who is removed from office for cause other than mental or physical incapacity shall receive no retirement compensation. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442

U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

**Cited** in Blackwelder v. State Dep't of Human Resources, 60 N.C. App. 331, 299 S.E.2d 777 (1983); In re City of Durham Annexation Ordinance Numbered 5991 for Area A, 69 N.C. App. 77, 316 S.E.2d 649 (1984).

## Sec. 9. Superior Courts.

(1) *Superior Court districts.* The General Assembly shall, from time to time, divide the State into a convenient number of Superior Court judicial districts and shall provide for the election of one or more Superior Court Judges for each district. Each regular Superior Court Judge shall reside in the district for which he is elected. The General Assembly may provide by general law for the selection or appointment of special or emergency Superior Court Judges not selected for a particular judicial district.

(2) *Open at all times; sessions for trial of cases.* The Superior Courts shall be open at all times for the transaction of all business except the trial of issues of fact requiring a jury. Regular trial sessions of the Superior Court shall be held at times fixed pursuant to a calendar of courts promulgated by the Supreme Court. At least two sessions for the trial of jury cases shall be held annually in each county.

(3) *Clerks.* A Clerk of the Superior Court for each county shall be elected for a term of four years by the qualified voters thereof, at the same time and places as members of the General Assembly are elected. If the office of Clerk of the Superior Court becomes vacant otherwise than by the expiration of the term, or if the people fail to elect, the senior regular resident Judge of the Superior Court serving the county shall appoint to fill the vacancy until an election can be regularly held.

**History.** — The provisions of this section are similar to those of Art. IV, § 7, Const. 1868, as that article was rewritten in 1962.

**Defeated Amendment Proposals.** — An amendment proposed by Session Laws 1981, c. 504, and defeated at the general election held in 1982, would have substituted "at the places and on the day prescribed by law" for "at the same time and places as members of the General Assembly are elected" at the end of the first sentence of subsection (3).

An amendment proposed by Session Laws 1985, c. 768, s. 9, and defeated at the primary election held on May 6, 1986, would have amended this section by adding "except that those elected in 1986 and 1988 shall serve for a term of five years" at the end of the first sentence of subsection (3).

An amendment proposed by Session Laws 1985, c. 768, s. 9.1(1), and defeated at the primary election held on May 6, 1986, would have amended this section by adding "except in 1988 at the same time and place as members of the United States House of Representatives are elected" at the end of the first sentence of subsection (3).

### CASE NOTES

**Election of Judges Not Mandated by Federal Constitution.** — North Carolina could by Constitution provide for the appointment of all State judges without violating any provision of the federal Constitution. The election of superior court judges is not a necessary characteristic of a republican form of government and is not required by the Constitution of the United States. This is a political rather than a judicial question. Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd, 409 U.S. 807, 93 S. Ct. 43, 34 L. Ed. 2d 68 (1972).

**Validity of Superior Court Election, Rotation, and Residency Provisions.** — There can be no doubt as to the validity under the federal Constitution of the provisions of the North Carolina Constitution requiring the election of superior court judges by districts or statewide as prescribed by the legislature, or that the State be divided into divisions and districts and judges rotate among the districts, or that they reside in their respective districts. Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd, 409 U.S. 807, 93 S. Ct. 43, 34 L. Ed. 2d 68 (1972).

A superior court judge is a hybrid official with both local and statewide functions and authority. The requirement that he reside in the district from which he is elected is a matter of convenience, making him available to hear emergency matters, and convenience is an essential factor in arranging an effective judicial system. He rotates among the districts of his division, and may be assigned beyond his division by the Chief Justice. Thus, there is a reasonable basis for election procedure requiring him to be nominated in the primary election and elected in the general election by statewide vote, and it serves and achieves a legitimate State purpose and is not arbitrary and capricious. Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd, 409 U.S. 807, 93 S. Ct. 43, 34 L. Ed. 2d 68 (1972).

**The one man, one vote rule does not apply to the State judiciary,** and therefore a mere showing of a disparity among the voters or in the population figures of the district would not be sufficient to strike down the election procedure for superior court judges. A showing of an arbitrary and capricious or invidious action or distinction between citizens and voters would be required. Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd, 409 U.S. 807, 93 S. Ct. 43, 34 L. Ed. 2d 68 (1972).

**The issuance of a commission by the chief justice assigning a superior court judge** to preside over a session of superior court does not endow the judge with jurisdiction, power, or authority to act as a superior court judge; the commission so issued merely manifests that such judge has been duly assigned pursuant to the Constitution to preside over such session of court. The judge's jurisdiction, power, and authority as a superior court judge flow from the Constitution of North Carolina and his appointment and commission by the Governor as a superior court judge. State v. Eley, 326 N.C. 759, 392 S.E.2d 394 (1990).

**Applied** in State ex rel. Martin v. Preston, 325 N.C. 438, 385 S.E.2d 473 (1989).

**Cited** in Republican Party v. Hunt, 841 F. Supp. 722 (E.D.N.C.); Bradshaw v. Administrative Office of Courts, 320 N.C. 132, 357 S.E.2d 370 (1987); Republican Party v. Martin, 980 F.2d 943 (4th Cir. 1992); Capital Outdoor Adv., Inc. v. City of Raleigh, 109 N.C. App. 399, 427 S.E.2d 154 (1993); Blankenship v. Bartlett, 184 N.C. App. 327, 646 S.E.2d 584, 2007 N.C. App. LEXIS 1452 (2007).

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**Regarding requirements for becoming a Senior Resident Superior Court Judge,** see opinion of Attorney General to Honorable Thomas Ross, Superior Court Judge, N.C. General Assembly, 1999 N.C.A.G. 14 (5/27/99).

## Sec. 10. District Courts.

The General Assembly shall, from time to time, divide the State into a convenient number of local court districts and shall prescribe where the District Courts shall sit, but a District Court must sit in at least one place in each county. District Judges shall be elected for each district for a term of four years, in a manner prescribed by law. When more than one District Judge is authorized and elected for a district, the Chief Justice of the Supreme Court shall designate one of the judges as Chief District Judge. Every District Judge shall reside in the district for which he is elected. For each county, the senior regular resident Judge of the Superior Court serving the county shall appoint from nominations submitted by the Clerk of the Superior Court of the county, one or more Magistrates who shall be officers of the District Court. The initial term of appointment for a magistrate shall be for two years and subsequent terms shall be for four years. The number of District Judges and Magistrates shall, from time to time, be determined by the General Assembly. Vacancies in the office of District Judge shall be filled for the unexpired term in a manner prescribed by law. Vacancies in the office of Magistrate shall be filled for the unexpired term in the manner provided for original appointment to the office, unless otherwise provided by the General Assembly. (2004-128, s. 16.)

**History.** — The provisions of this section are similar to those of Art. IV, § 8, Const. 1868, as that article was rewritten in 1962.

**Defeated Amendment Proposals.** — An amendment proposed by Session Laws 1985, c. 768, s. 8, and defeated at the primary election held on May 6, 1986, would have amended this section by adding "except that those elected in 1986 and 1988 shall serve for a term of five years" at the end of the second sentence.

**Editor's Note.** — Session Laws 2004-128, ss. 17 and 18, provide: "SECTION 17. The amendment set out in Section 16 of this act shall be submitted to the qualified voters of the

State at the general election in November 2004, which election shall be conducted under the laws then governing elections in the State. Ballots, voting systems, or both may be used in accordance with Chapter 163 of the General Statutes. The question to be used in the voting systems and ballots shall be:

'[ ] FOR [ ] AGAINST

"Constitutional amendment to provide for the first term of office for magistrates of the General Court of Justice to be two years and for subsequent terms to be four years.'

"SECTION 18. If a majority of the votes cast on the question are in favor of the amendment set out in Section 16 of this act, the State Board of Elections shall certify the amendment to the Secretary of State, who shall enroll the amendment so certified among the permanent records of that office. The amendment becomes effective January 1, 2005."

Section Laws 2004-128, s. 20, provides that s. 19 of the act becomes effective January 1, 2005, but only upon voter approval of the constitutional amendment to N.C. Const. art. IV, § 10, proposed in s. 16 of the act, and is applicable to appointments that take effect after January 1, 2005.

The constitutional amendment proposed by Session Laws 2004-128, s. 16, was adopted by vote of the people at the general election held November 2, 2004, and the results of the election were certified by the State Board of Elections.

**Legal Periodicals.** — For comment on changing North Carolina's method of judicial selection, see 25 Wake Forest L. Rev. 253 (1990).

## CASE NOTES

**Preference May Be Given to Political Party of Vacating Judge.** — The General Assembly may require that, in the interim appointment of a district court judge, preference must be given to a member of the same political party as the vacating judge.

Section 7A-142, which provides that candidates for a vacancy in the office of a district judge shall be members of the same political party as the vacating judge does not violate the Constitution of North Carolina. Baker v. Martin, 330 N.C. 331, 410 S.E.2d 887 (1991).

**Applied** in State ex rel. Martin v. Preston, 325 N.C. 438, 385 S.E.2d 473 (1989).

**Cited** in Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971); State v. Greer, 58 N.C. App. 703, 294 S.E.2d 745 (1982); Bradshaw v. Administrative Office of Courts, 320 N.C. 132, 357 S.E.2d 370 (1987); In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991); Republican Party v. Martin, 980 F.2d 943 (4th Cir. 1992).

## OPINIONS OF ATTORNEY GENERAL

**In the case of a vacancy on the district court,** the appointment of a new judge is for the entire unexpired term. See opinion of Attorney General to The Honorable Christopher W. Bragg, Union County Courthouse, 2004 N.C. AG LEXIS 12 (11/18/04).

# Sec. 11. Assignment of Judges.

The Chief Justice of the Supreme Court, acting in accordance with rules of the Supreme Court, shall make assignments of Judges of the Superior Court and may transfer District Judges from one district to another for temporary or specialized duty. The principle of rotating Superior Court Judges among the various districts of a division is a salutary one and shall be observed. For this purpose the General Assembly may divide the State into a number of judicial divisions. Subject to the general supervision of the Chief Justice of the Supreme Court, assignment of District Judges within each local court district shall be made by the Chief District Judge.

**History.** — The provisions of this section are similar to those of Art. IV, § 9, Const. 1868, as that article was rewritten in 1962.

### CASE NOTES

**The issuance of a nunc pro tunc commission was unquestionably lawful** and in full accord with the Constitution of North Carolina. State v. Eley, 326 N.C. 759, 392 S.E.2d 394 (1990).

**The issuance of a commission by the Chief Justice assigning a superior court judge** to preside over a session of superior court does not endow the judge with jurisdiction, power, or authority to act as a superior court judge; the commission so issued merely manifests that such judge has been duly assigned pursuant to the Constitution to preside over such session of court. The judge's jurisdiction, power, and authority as a superior court judge flow from the Constitution of North Carolina and his appointment and commission by the Governor as a superior court judge. State v. Eley, 326 N.C. 759, 392 S.E.2d 394 (1990).

Where the evidence showed that a judge was instructed to hold superior court in a certain county by the Chief Justice of the North Carolina Supreme Court, defendant did not have a valid argument that the judge lacked a commission to conduct criminal court. State v. Price, — N.C. App. —, 611 S.E.2d 891 (2005).

**Validity of Superior Court Election, Rotation, and Residency Provisions.** — There can be no doubt as to the validity under the federal Constitution of the provisions of the North Carolina Constitution requiring the election of superior court judges by districts or statewide as prescribed by the legislature, or that the State be divided into divisions and districts and judges rotate among the districts, or that they reside in their respective districts. Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd, 409 U.S. 807, 93 S. Ct. 43, 34 L. Ed. 2d 68 (1972).

The system of rotating superior court judges does not deny a defendant due process of law on grounds that in a protracted trial more than one judge might rule on the many motions. State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981).

**Judicial Notice of Assignment of Judges.** — The Supreme Court would take judicial notice of the minute book showing the assignment of judges by the Chief Justice, and would take notice that the superior court judge holding the particular term of court in question had been assigned to hold said term. Staton v. Blanton, 259 N.C. 383, 130 S.E.2d 686 (1963), decided under former Art. IV, Const. 1868.

**The commission to preside, issued by the Chief Justice, was sufficient** and the assigned judge had proper jurisdiction when he signed both the equitable distribution judgment and the order dismissing defendant's appeal. Lockert v. Lockert, 116 N.C. App. 73, 446 S.E.2d 606, cert. granted in part and denied in part, writ of supersedeas allowed, 338 N.C. 311, 450 S.E.2d 487 (1994).

**Three-Judge Panel for Redistricting Challenges Does Not Infringe on Chief Justice's Authority.** — The provisions of G.S. 1-267.1, within the specific context of a challenge to redistricting, do not impermissibly infringe on the Chief Justice's authority to assign judges, pursuant to his powers under N.C. Const. art. IV, § 11. Stephenson v. Bartlett, 358 N.C. 219, 595 S.E.2d 112 (2004).

**As to statutes implementing corresponding provision of former Art. IV, Const. 1868,** prior to its revision in 1962, see Baker v. Varser, 239 N.C. 180, 79 S.E.2d 757 (1954).

**Cited** in Republican Party v. Hunt, 841 F. Supp. 722 (E.D.N.C.); Carr v. Great Lakes Carbon Corp., 49 N.C. App. 631, 272 S.E.2d 374 (1980); Republican Party v. Martin, 980 F.2d 943 (4th Cir. 1992); Vance Constr. Co. v. Duane White Land Corp., 127 N.C. App. 493, 490 S.E.2d 588 (1997).

## Sec. 12. Jurisdiction of the General Court of Justice.

(1) *Supreme Court.* The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference. The jurisdiction of the Supreme Court over "issues of fact" and "questions of fact" shall be the same exercised by it prior to the adoption of this Article, and the Court may issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts. The Supreme Court also has jurisdiction to review, when authorized by law, direct appeals from a final order or decision of the North Carolina Utilities Commission.

(2) *Court of Appeals.* The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe.

(3) *Superior Court.* Except as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State. The Clerks of the Superior Court shall have such jurisdiction and

powers as the General Assembly shall prescribe by general law uniformly applicable in every county of the State.

(4) *District Courts; Magistrates.* The General Assembly shall, by general law uniformly applicable in every local court district of the State, prescribe the jurisdiction and powers of the District Courts and Magistrates.

(5) *Waiver.* The General Assembly may by general law provide that the jurisdictional limits may be waived in civil cases.

(6) *Appeals.* The General Assembly shall by general law provide a proper system of appeals. Appeals from Magistrates shall be heard de novo, with the right of trial by jury as defined in this Constitution and the laws of this State. (1981, c. 803, s. 1.)

**History.** — The provisions of this section are similar to those of Art. IV, § 10, Const. 1868, as that article was rewritten in 1962 and as amended in 1965.

**Legal Periodicals.** — For survey of case law as to direct appeal to State Supreme Court from order or decision of Utilities Commission, see 44 N.C.L. Rev. 890 (1966).

For note analyzing possible constitutional barriers to judicial abrogation of contractual governmental immunity, see 12 Wake Forest L. Rev. 1082 (1976).

For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

For article, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

For comment, "The Advisory Opinion in North Carolina: 1947 to 1991," see 70 N.C.L. Rev. 1853 (1992).

## CASE NOTES

I. General Consideration.
II. Supreme Court.
  A. In General.
  B. Claims Against State.

### I. GENERAL CONSIDERATION.

***Editor's Note.*** — *Some of the cases cited below were decided under former Art. IV, § 10, Const. 1868, as rewritten in 1962 and as amended in 1965, and under corresponding provisions of former Art. IV prior to its 1962 revision.*

**Meaning of Subsection (1).** — Subsection (1) of this section, retaining the jurisdiction of the Supreme Court over "issues of fact" and "questions of fact" as it had existed prior to the 1971 revision, has no relation to the court's prior original jurisdiction over claims against the State. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

**Subsection (6) of this section refers to a system of appeals from a lower court to a higher court** within the General Court of Justice. State ex rel. N.C. Utils. Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 142 S.E.2d 8 (1965).

**When the jurisdiction of a particular court is constitutionally defined,** the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the Constitution. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The principle that when the jurisdiction of a particular court is constitutionally defined the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the Constitution is grounded on the separation of powers provisions found in many American Constitutions, including the Constitution of this State. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

**The superior court has original general jurisdiction** throughout the State except as otherwise provided by the General Assembly. State v. Wall, 271 N.C. 675, 157 S.E.2d 363 (1967).

**Jurisdiction of District Courts.** — The General Assembly is authorized by general law to prescribe the jurisdiction and powers of district courts. State v. Wall, 271 N.C. 675, 157 S.E.2d 363 (1967).

Appeal procedures in G.S. 7A-272(d) prevail over the general rule of G.S. 15A-1347; therefore, after defendant's felony probation was revoked in district court, defendant was allowed to appeal the case to the North Carolina Court of Appeals instead of a superior court. State v. Hooper, 158 N.C. App. 654, 582 S.E.2d 331, 2003 N.C. App. LEXIS 1223 (2003).

Where a petition to terminate parental rights was captioned with the names of both children, but the summons that was issued referenced only the younger child, the trial court lacked subject matter jurisdiction to terminate the mother's parental rights in the older child because a summons pertaining to the child was not issued. In re C.T., 182 N.C. App. 472, 643 S.E.2d 23, 2007 N.C. App. LEXIS 683 (2007).

**The court of appeals has no jurisdiction to entertain a motion for summary judgment** made for the first time on appeal. Britt v. Allen, 12 N.C. App. 399, 183 S.E.2d 303 (1971).

**Jurisdiction over Civil and Criminal Appeals from District Court.** — The constitutional and statutory structure of our General Court of Justice provides that, generally, appeals from the district court in civil causes go to the Court of Appeals, while appeals from the district court in criminal causes must go first to the superior court. State v. Killian, 25 N.C. App. 224, 212 S.E.2d 419 (1975).

**Review of Judicial Disciplinary Proceedings.** — Under this section and G.S. 7A-32 the courts of the appellate division have power to review judicial disciplinary proceedings, whether the attorney or the State has prevailed in the trial court. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

The State may seek review by the appellate division of proceedings disciplining attorneys under the judicial method. However, the State may not appeal in such cases as a matter of right, but must seek appellate review by petition for writ of certiorari. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

**Review of Attorney Disciplinary Proceedings.** — The Court of Appeals of North Carolina lacked jurisdiction to hear the State Bar of North Carolina's appeal of a grant of summary judgment to an attorney in a disciplinary proceeding because G.S. 84-28(h) provided no appeal from a final order that did not impose discipline, and in the instant case, no discipline had been imposed. N.C. State Bar v. Rudisill, 159 N.C. App. 704, 583 S.E.2d 413, 2003 N.C. App. LEXIS 1527 (2003).

**Jurisdiction over Eastern Band of Cherokee in Civil Matters.** — North Carolina has had civil jurisdiction over the Eastern Band of the Cherokee at least since the emigration west following the Treaty of New Echota, when the Indians remaining in North Carolina became subject to the laws of the State. The fact that these Indians have since been recognized as an Indian tribe and brought under federal supervision did not remove the existing jurisdiction of the State of North Carolina. Sasser v. Beck, 40 N.C. App. 668, 253 S.E.2d 577, cert. denied, 298 N.C. 300, 259 S.E.2d 915 (1979).

The courts of this State have jurisdiction over a member of the Eastern Band of Cherokee Indians in a tort claim by a non-Indian arising from an occurrence on land within the Qualla Boundary. Sasser v. Beck, 40 N.C. App. 668, 253 S.E.2d 577, cert. denied, 298 N.C. 300, 259 S.E.2d 915 (1979).

**The subject matter jurisdiction of the clerks of the superior court** can only be conferred by statute. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

**Jurisdiction over a District Court's Revocation of Probation.** — When a district court revokes a defendant's probation, that defendant's appeal is to the superior court rather than the Court of Appeals of North Carolina; thus, G.S. 15A-1347, rather than G.S. 7A-272(d), governed defendant's appeal of a probation revocation and the court of appeals lacked jurisdiction to hear the appeal. State v. Hooper, 358 N.C. 122, 591 S.E.2d 514, 2004 N.C. LEXIS 12 (2004).

**Three-Judge Panel for Redistricting Challenges Held Constitutional.** — Three-judge panel of superior court judges required by G.S. 1-267.1 is not a new court outside of the contemplation of N.C. Const. art. IV, §§ 12 and 13(2), as a challenge to redistricting is a matter of procedure that lies within the purview of the General Assembly; accordingly, no new courts are created beyond those contemplated by N.C. Const. art. IV, §§ 1, 2. Stephenson v. Bartlett, 358 N.C. 219, 595 S.E.2d 112 (2004).

**Applied** in City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972); Lawing v. Jaynes, 285 N.C. 418, 206 S.E.2d 162 (1974); In re Thomas, 290 N.C. 410, 226 S.E.2d 371 (1976); In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979); State v. Freeman, 319 N.C. 609, 356 S.E.2d 765 (1987); State v. Dudley, 319 N.C. 656, 356 S.E.2d 361 (1987); Crist v. Moffatt, 326 N.C. 326, 389 S.E.2d 41 (1990); Travco Hotels, Inc. v. Piedmont Natural Gas Co., 332 N.C. 288, 420 S.E.2d 426 (1992); Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 515 S.E.2d 675, 1999 N.C. App. LEXIS 432 (1999); Shavitz v. City of High Point, 270 F. Supp. 2d 702, 2003 U.S. Dist. LEXIS 11839 (M.D.N.C. 2003); N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 599 S.E.2d 888, 2004 N.C. LEXIS 909 (2004); Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 362 N.C. 191, 657 S.E.2d 361, 2008 N.C. LEXIS 148 (2008).

**Cited** in Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971); Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971); State v. Harrell, 279 N.C. 464, 183 S.E.2d 638 (1971); State v. McIntyre, 33 N.C. App. 557, 235 S.E.2d 920 (1977); Waters v. Qualified Personnel, Inc., 294 N.C. 200, 240 S.E.2d 338 (1978); Balcon, Inc. v. Sadler, 36 N.C. App. 322, 244 S.E.2d 164 (1978); Yale v. National Indem. Co., 602 F.2d 642 (4th Cir. 1979); Bailey v. Gooding, 301 N.C. 205, 270 S.E.2d 431 (1980); In re Wharton, 54 N.C. App. 447, 283 S.E.2d 528 (1981); In re Wharton, 305 N.C. 565, 290 S.E.2d 688 (1982); State ex rel. Edmisten v. Tucker, 312 N.C. 326, 323 S.E.2d 294 (1984); L. Harvey & Son Co. v. Harman, 76 N.C. App. 191, 333 S.E.2d 47 (1985); State v. Bolt, 81 N.C. App. 133, 344 S.E.2d 51 (1986); Lea Co. v. North Carolina Bd. of Transp., 317 N.C. 254, 345 S.E.2d 355 (1986); State v. Mitchell, 325 N.C. 539, 385 S.E.2d 324 (1989); In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991); In re Alamance County Ct. Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991); Republican Party v. Martin, 980 F.2d 943 (4th Cir. 1992); Bailey v. North Carolina Dep't of Revenue, 353 N.C. 142, 540 S.E.2d 313, 2000 N.C. LEXIS 896 (2000); In re Voight, 138 N.C. App. 542, 530 S.E.2d 76, 2000 N.C. App. LEXIS 624 (2000); Norris v. Sattler, 139 N.C. App. 409, 533 S.E.2d 483, 2000 N.C. App. LEXIS 894 (2000); State v. Jones, 161 N.C. App. 60, 588 S.E.2d 5; State v. Hunt, 357 N.C. 257, 582 S.E.2d 593, 2003 N.C. LEXIS 746 (2003); State v. Norris, 360 N.C. 507, 630 S.E.2d 915, 2006 N.C. LEXIS 592 (2006); Capps v. NW Sign Indus. of N.C., Inc., 186 N.C. App. 616, 652 S.E.2d 372, 2007 N.C. App. LEXIS 2268 (2007); Selwyn Vill. Homeowners Ass'n v. Cline & Co., 186 N.C. App. 645, 651 S.E.2d 909, 2007 N.C. App. LEXIS 2297 (2007); State ex rel. Utils. Comm'n v. Town of Kill Devil Hills, — N.C. App. —, 670 S.E.2d 341, 2009 N.C. App. LEXIS 4 (2009).

## II. SUPREME COURT.

### A. In General.

**The jurisdiction of the Supreme Court is conferred and defined by the Constitution,** not by the General Assembly. State ex rel. N.C. Utils. Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 142 S.E.2d 8 (1965); Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

**It Relates Solely to Appeals from Lower Courts.** — The appellate jurisdiction of the Supreme Court relates solely to appeals from decisions of "the courts below." State ex rel. N.C. Utils. Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 142 S.E.2d 8 (1965); Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The Supreme Court is an appellate court. Its function, under the Constitution, is to review alleged errors and rulings of the trial court, and unless and until it is shown that a trial court ruled on a particular question, it is not given for the Supreme Court to make specific rulings thereon. Greene v. Spivey, 236 N.C. 435, 73 S.E.2d 488 (1952).

**And Does Not Include Direct Appeals from Agencies.** — Under this section, the jurisdiction of the Supreme Court is to review, on appeal, decisions "of the courts below." This does not include jurisdiction to review on direct appeal the decisions of administrative agencies. State ex rel. N.C. Utils. Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 142 S.E.2d 8 (1965); Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The General Assembly has no authority to provide for appeal from decisions of administrative agencies to the Supreme Court without prior appeal to and review by a lower court within the General Court of Justice. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The Utilities Commission, being an administrative agency and not a part of the General Court of Justice, direct appeals from the Utilities Commission to the Supreme Court are not constitutionally permissible. State ex rel. Utils. Comm'n v. VEPCO, 21 N.C. App. 45, 203 S.E.2d 418, rev'd on other grounds, 285 N.C. 398, 206 S.E.2d 283 (1974).

**The Supreme Court is strictly an appellate court,** its jurisdiction limited "to review upon appeal any decision of the court below upon any matter of law or legal inference." Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

**And the General Assembly May Not Expand Its Appellate Jurisdiction.** — The General Assembly is without authority to expand the appellate jurisdiction of the Supreme Court beyond the limits set in the Constitution. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

**The Supreme Court has supervisory jurisdiction over the lower courts,** and will exercise this jurisdiction in order that the case may be tried on the correct theory below and unnecessary delay in the administration of justice be thereby prevented. Greene v. Charlotte Chem. Labs., Inc., 254 N.C. 680, 120 S.E.2d 82 (1961).

The Supreme Court has general supervisory authority over the orders, judgments, and decrees of the superior courts of the State; this is a prerogative which, in a proper case, when necessary to promote the expeditious administration of justice, the Supreme Court will not hesitate to exercise. Park Terrace, Inc. v. Phoenix Indem. Co., 243 N.C. 595, 91 S.E.2d 584 (1956); Brice v. Robertson House Moving, Wrecking & Salvage Co., 249 N.C. 74, 105 S.E.2d 439 (1958); In re Brownlee, 301 N.C. 532, 272 S.E.2d 861 (1981).

The Supreme Court will not hesitate to exercise its rarely used general supervisory authority when necessary to promote the expeditious administration of justice. State v. Stanley, 288 N.C. 19, 215 S.E.2d 589 (1975).

Supreme Court of North Carolina had subject matter jurisdiction to review the orders of the Wake County Superior Court issued in election protests and a declaratory judgment action because N.C. Const. art. IV, § 12 granted the court authority to exercise appellate review of any decision of the courts below. James v. Bartlett, 359 N.C. 260, 607 S.E.2d 638, 2005 N.C. LEXIS 146 (2005).

Statute could not have restricted the Supreme Court of North Carolina's constitutional authority under N.C. Const., Art. IV, § 12(1) to exercise jurisdiction to review upon appeal any decision of the courts below, and as such, the Supreme Court of North Carolina did not hesitate to exercise its rarely used general supervisory authority when necessary to promote the expeditious administration of justice, and did so to consider questions that were not properly presented according to its rules; this exercise of supervisory authority was particularly appropriate when prompt and definitive resolution of an issue was necessary to ensure the uniform administration of North Carolina's criminal statutes. State v. Ellis, 361 N.C. 200, 639 S.E.2d 425, 2007 N.C. LEXIS 38 (2007).

North Carolina Supreme Court determined that the Court should exercise the Court's constitutional supervisory power, under N.C. Const., Art. IV, § 12(1), in a case in which a department of social services was ordered to pursue termination of a father's parental rights to address the father's challenge to the trial court's jurisdiction, despite the lack of a final order, because (1) the Court was cognizant that a court, which lacked subject matter jurisdiction over a dispute was absolutely without power to render a decision upon it; and (2) there could be questions in the trial courts and intermediate appellate court as to which provisions of Article 4 of the Juvenile Code were jurisdictional in nature. In re A.R.G., 361 N.C. 392, 646 S.E.2d 349, 2007 N.C. LEXIS 597 (2007).

**Issuance of Remedial Writs to Control Proceedings of Inferior Courts.** — The Supreme Court is vested with authority to issue any remedial writ necessary to give it general supervision and control over the proceedings of inferior courts. State v. Cochran, 230 N.C. 523, 53 S.E.2d 663 (1949).

A judge of the superior court has no authority or jurisdiction to issue a writ of mandamus or prohibition to a district court judge. Those remedies are reserved by subdivision (1) of this section to the Supreme Court. In re Redwine, 312 N.C. 482, 322 S.E.2d 769 (1984).

**What Matters Are Reviewable in Supreme Court — In General.** — On appeal to the Supreme Court, only error as to the law or legal inferences are reviewable upon the record in the case. Merchants Nat'l Bank v. Howard, 188 N.C. 543, 125 S.E. 126 (1924); State v. Neill, 244 N.C. 252, 93 S.E.2d 155 (1956). See also, McKay v. Bullard, 219 N.C. 589, 14 S.E.2d 657 (1941).

The Supreme Court on appeal in a criminal action can review only matters of law or legal inference. State v. Brewer, 202 N.C. 187, 162 S.E. 363 (1932). See also, State v. Anderson, 208 N.C. 771, 182 S.E. 643 (1935).

This section empowers the Supreme Court to review on appeal any decision of the courts below, upon any matter of law or legal inference; and this is to be presented in accordance with the mandatory rules of the Supreme Court. State v. Bittings, 206 N.C. 798, 175 S.E. 299 (1934). See also, State v. Jackson, 211 N.C. 202, 189 S.E. 510 (1937).

Under the provisions of this section, the Supreme Court, on appeal from an issue of devisavit vel non, involved in the trial of a caveat to a will, is confined to a consideration of assignments of error in matters of law and legal inference. In re Will of Brown, 194 N.C. 583, 140 S.E. 192 (1927).

The Supreme Court has authority to review the record on appeal and to grant a new trial or give other appropriate relief for an error of law committed by the trial court. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216 (1976).

**Same — Evidence and Credibility.** — The competency, admissibility and sufficiency of the evidence in a criminal action is for the court, while the weight, effect and credibility is for the jury, and on appeal the Supreme Court can review only matters of law or legal inference. State v. Casey, 201 N.C. 185, 159 S.E. 337 (1931); Debnam v. Rouse, 201 N.C. 459, 160 S.E. 471 (1931); Carter v. Mullinax, 201 N.C. 783, 161 S.E. 486 (1931); Woody Bros. Bakery v. Greensboro Life Ins. Co., 201 N.C. 816, 161 S.E. 554 (1931); State v. Harrell, 203 N.C. 210, 165 S.E. 551 (1932); State v. Whiteside, 204 N.C. 710, 169 S.E. 711 (1933).

The Supreme Court must accept as conclusive the verdict of the jury, so far as the credibility of witnesses is concerned. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216 (1976).

The Supreme Court has no authority to grant a new trial or other relief to a defendant convicted of a criminal offense in a trial free from an error of law on grounds that it disagrees with the jury concerning the credibility of a witness for the State. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216 (1976).

**Advisory Opinions.** — The North Carolina Constitution does not authorize the Supreme Court as a Court to issue advisory opinions; and while advisory opinions of individual justices may be persuasive authority for the points of law addressed, they are in no sense binding or obligatory on those points. In re Advisory Opinion, 314 N .C. 679, 335 S.E.2d 890 (1985).

**Editor's Note.** — The North Carolina Supreme Court declined to issue an advisory opinion as contemplated by Session Laws 1985, c. 746, on the grounds that to issue such an opinion would be to place the Court directly into the stream of the legislative process. In re Advisory Opinion, 314 N.C. 679, 335 S.E.2d 890 (1985).

**The North Carolina Supreme Court is not a fact-finding body.** State v. Lawson, 310 N.C. 632, 314 S.E.2d 493 (1984), cert. denied, 471 U.S. 1120, 105 S. Ct. 2368, 86 L. Ed. 2d 267 (1985).

**When Issues of Fact May Be Reviewed.** — The jurisdiction of the Supreme Court over issues of fact, under this section, will be assumed upon two conditions: (1) If the matter is of such an equitable nature as a court of equity under the former system took exclusive cognizance of; (2) If the proofs are written and documentary and in all respects the same as they were when the judge of the court below passed upon them. Worthy v. Shields, 90 N.C. 192 (1884). See also, Keener v. Finger, 70 N.C. 35 (1874).

For case defining "issues of fact," see Battle v. Mayo, 102 N.C. 413, 9 S.E. 384 (1889).

Prohibition of trial of "issues of fact" by the Supreme Court extends to issues of fact as heretofore understood, and does not hinder the Court from trying such questions of fact as may be involved in a consideration of the propriety of continuing or vacating an order for a provisional injunction. Heilig v. Stokes, 63 N.C. 612 (1869).

The Supreme Court cannot consider a paper which, unrelated to the trial, purports upon its face to have raised an issue of fact after the adjournment as to the recitals set forth in the commission given the presiding judge. State v. Graham, 194 N.C. 459, 140 S.E. 26 (1927).

**"Findings" Contemplated Under G.S. 15A-2000(d)(2) in Review of Death Sentences.** — While G.S. 15A-2000(d)(2) uses the word "finding" in prescribing the Supreme Court's review of death sentences, a "finding of fact," as that term is generally understood, is not contemplated. Rather, "a finding," as used in that section means a "determination" or a "conclusion." State v. Lawson, 310 N.C. 632, 314 S.E.2d 493 (1984).

Section 15A-2000(d)(2) requires the Supreme Court to determine, as a matter of law, whether (1) the record supports the jury's finding of any aggravating circumstance upon which the trial court based its sentence of death, (2) the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor, or (3) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. The statute neither contemplates nor requires the court to make factual findings. State v. Lawson, 310 N.C. 632, 314 S.E.2d 493 (1984).

**Section 15A-2000(d) is not unconstitutional** as an impermissible expansion of the Supreme Court's jurisdiction. State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981).

**Determination of Sufficiency of Amended Complaint.** — The Supreme Court, in the exercise of its supervisory jurisdiction, could determine the sufficiency of an amended complaint, including matters stricken therefrom in the lower court, as though a demurrer ore tenus to the amended complaint in its entirety had been lodged in the Supreme Court, and its ruling that a pleading, thus considered, was insufficient to state a cause of action necessarily included an affirmance of the order of the lower court sustaining the demurrer ore tenus to the amended complaint exclusive of the portions previously stricken out. Philbrook v. Chapel Hill Hous. Auth., 269 N.C. 598, 153 S.E.2d 153 (1967).

**Determination of Matter Where Appeal Is Premature.** — Where an order of the superior court is interlocutory, and an appeal therefrom to the Supreme Court is premature and is subject to dismissal, the Supreme Court in the exercise of its supervisory jurisdiction may nevertheless, in proper instances, determine the matter in order to obviate a wholly unnecessary and circuitous course of procedure. Edwards v. City of Raleigh, 240 N.C. 137, 81 S.E.2d 273 (1954); Kelly v. Piper, 243 N.C. 54, 89 S.E.2d 764 (1955).

**Consideration of Questions Not Properly Presented.** — Where the lower court holds the statute attacked by defendant to be unconstitutional, the Supreme Court, in the exercise of its supervisory jurisdiction over the inferior courts, may consider the constitutional questions, notwithstanding that defendant failed properly to present them in the lower court, but even so the Supreme Court will ordinarily consider only the specific constitutional questions discussed in the brief. Rice v. Rigsby, 259 N.C. 506, 131 S.E.2d 469 (1963).

In the exercise of the constitutional power vested in the Supreme Court to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts, the Court would overlook defendant's failure to designate the specific constitutional provisions that he contended 1955 Session Laws, c. 358, violated, and consider the question, even though the procedure prescribed by the rules of practice as necessary to present such question was not followed. Rice v. Rigsby, 259 N.C. 506, 131 S.E.2d 469 (1963).

Ordinarily, the Supreme Court will not consider questions not properly presented by objections duly made, exceptions duly entered, and assignments of error properly set out, though it may do so in exceptional circumstances in the exercise of its supervisory and controlling jurisdiction over the proceedings of the other courts vested in it by this section. State v. Hewett, 270 N.C. 348, 154 S.E.2d 476 (1967).

The Supreme Court, in the exercise of its supervisory jurisdiction, may decide questions on the merits, even though the procedure prescribed by the rules of practice as necessary to present such questions has not been followed. Eastern Steel Prods. Corp. v. Chestnutt, 252 N.C. 269, 113 S.E.2d 587 (1960).

Under unusual and exceptional circumstances the court will exercise power under this section to consider questions which are not properly presented according to the rules. State v. Stanley, 288 N.C. 19, 215 S.E.2d 589 (1975).

**Correction of Error in Judgment In Rem Where Appeal Is Subject to Dismissal.** — Even though an appeal may be subject to dismissal, if the proceeding is in rem and the judgment entered in the court below vitally affects the title to real property, the Supreme Court will take jurisdiction for the purpose of correcting an error in the judgment. This can be done in the exercise of its supervisory power. Ange v. Ange, 235 N.C. 506, 71 S.E.2d 19 (1952); Edwards v. Butler, 244 N.C. 205, 92 S.E.2d 922 (1956).

**Review of Habeas Corpus Proceedings.** — No appeal to the Supreme Court lies upon the refusal of the judge, having jurisdiction, to release the petitioner in habeas corpus proceedings, except in cases concerning the care and custody of children, the remedy being by application for the writ of certiorari which lies in the discretion of the appellate court. State v. Yates, 183 N.C. 753, 111 S.E. 337 (1922); State v. Hooker, 183 N.C. 763, 111 S.E. 351 (1922); In re Blake, 184 N.C. 278, 114 S.E. 294 (1922).

A decree in habeas corpus proceedings to determine the custody of a child as between its divorced parents is not appealable, the sole remedy being by certiorari to invoke the constitutional power of the Supreme Court to supervise and control proceedings of inferior courts. In re Ogden, 211 N.C. 100, 189 S.E. 119 (1937).

Although petitioner's purported appeal from a judgment rendered on return to a writ of habeas corpus would ordinarily have been dismissed, it would be treated as a petition for writ of certiorari by the Supreme Court in order that an important question presented by the record might be clarified. In re Renfrow, 247 N.C. 55, 100 S.E.2d 315 (1957).

**Certiorari.** — The Supreme Court has the power to issue any remedial writ necessary to give it general supervision and control over proceedings of the lower courts, and to this end would grant certiorari to review an order of the superior court ordering the State to pay attorney's fees for representation of an indigent defendant in the federal courts, which involved a question of public importance. State v. Davis, 270 N.C. 1, 153 S.E.2d 749, cert. denied, 389 U.S. 828, 88 S. Ct. 87, 19 L. Ed. 2d 84 (1967).

Where an application for writ of certiorari in the nature of a writ of error is made for the purpose of bringing up an appeal when the right of appeal is lost in the trial court by failure to file statement of case on appeal within the time allowed, applicant must negative laches and show merit. State v. Moore, 210 N.C. 686, 188 S.E. 421 (1936).

**Writ of Error Coram Nobis.** — There is no justification for a rule that would require a person who is not in prison to obtain permission from an appellate court in order to file a petition for a writ of error coram nobis to attack collaterally a final judgment of a trial court from which no appeal was taken. Dantzic v. State, 279 N.C. 212, 182 S.E.2d 563 (1971), overruling In re Taylor, 230 N.C. 566, 53 S.E.2d 857 (1949); State v. Daniels, 231 N.C. 509, 57 S.E.2d 653, cert. denied, 339 U.S. 954, 70 S. Ct. 837, 94 L. Ed. 1366 (1950), and State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970).

**Remand for Further Consideration.** — Where an order of the superior court made no ruling on exceptions to an order of the Public Utilities Commission, but remanded the cause to the Commission for a determination, after further proceedings, of the precise question it had theretofore considered and decided, without specifying the ground on which the court's order was based, the Supreme Court, under the circumstances, in the exercise of its power under this section to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts, would vacate the court's order and remand the cause to the superior court for consideration and decision of the questions raised by protestants' exceptions to the Commission's findings and order. State ex rel. Utils. Comm'n v. Maybelle Transp. Co., 252 N.C. 776, 114 S.E.2d 768 (1960).

**Case in which the State had no right of appeal** would be dismissed where the case was not one in which the alleged error appeared on the face of the record proper, which might have been corrected in the Supreme Court's supervisory power under this section, but was to review a ruling of the court entered on motion after trial, as well as an application for certiorari. State v. Todd, 224 N.C. 776, 32 S.E.2d 313 (1944).

**Adherence to Theory of Trial in Lower Court.** — The principle that an appeal will be determined in accordance with the theory of trial in the lower court is enforced by the Supreme Court because of its limited jurisdiction as an appellate court under this section. Apostle v. Acacia Mut. Life Ins. Co., 208 N.C. 95, 179 S.E. 444 (1935). See also, Ammons v. Fisher, 208 N.C. 712, 182 S.E. 479 (1935).

**Enforcement of Opinion and Mandate.** — When it comes to the attention of the Supreme Court that a lower court has failed to comply with the opinion of the Supreme Court, whether through insubordination, misinterpretation or inattention, the Supreme Court will, in the exercise of its supervisory jurisdiction, ex mero motu if necessary, enforce its opinion and mandate in accordance with the requirements of justice. Collins v. Simms, 257 N.C. 1, 125 S.E.2d 298 (1962).

### B. Claims Against State.

**The Constitution no longer gives the Supreme Court original jurisdiction over claims against the State.** Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

**And the General Assembly May Not Confer Such Jurisdiction.** — The Supreme Court has no original jurisdiction over claims against the State, and the General Assembly has no authority to confer such jurisdiction upon it. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

**The Supreme Court's jurisdiction over claims against the State is the same as over all other claims.** Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

**Trial Court Must Adjudicate Claims Against State.** — The appropriate trial court of the General Court of Justice now has original jurisdiction to adjudicate claims against the State. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

**Repeal and Unconstitutionality of G.S. 7A-25.** — Section 7A-25 was rendered null and void when the electorate approved revised N.C. Const., Art. IV, which deleted the provision granting the Supreme Court original jurisdiction of claims against the State. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Even if the General Assembly did not intend to repeal G.S. 7A-25, providing for original jurisdiction of claims against the State in the Supreme Court, by ratification of the 1971 revision of N.C. Const., Art. IV, § 7A-25 is unconstitutional. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

**As to the original jurisdiction formerly conferred upon the Supreme Court over claims against the State,** see Bledsoe v. State, 64 N.C. 392 (1870); Sinclair, Owens & Brown v. State, 69 N.C. 47 (1873); Clements v. State, 76 N.C. 199 (1877); Horne v. State, 82 N.C. 382 (1880); Bain v. State, 86 N.C. 49 (1882); Baltzer v. State, 104 N.C. 265, 10 S.E. 153 (1889); Burton v. Furman, 115 N.C. 166, 20 S.E. 443 (1894); Cowles v. State, 115 N.C. 173, 20 S.E. 384 (1894); Miller v. State, 134 N.C. 270, 46 S.E. 514 (1904); Carpenter v. Atlanta & C. Air Line Ry., 184 N.C. 400, 114 S.E. 693 (1922); Calkins Dredging Co. v. State, 191 N.C. 243, 131 S.E. 665 (1926); Lacy v. State, 195 N.C. 284, 141 S.E. 886 (1928); Rotan v. State, 195 N.C. 291, 141 S.E. 733 (1928); Warren v. State, 199 N.C. 211, 153 S.E. 864 (1930); Cohoon v. State, 201 N.C. 312, 160 S.E. 183 (1931); Dalton v. State Hwy. & Pub. Works Comm'n, 223 N.C. 406, 27 S.E.2d 1 (1943); Sale v. State Hwy. & Pub. Works Comm'n, 242 N.C. 612, 89 S.E.2d 290 (1955).

### OPINIONS OF ATTORNEY GENERAL

**Authority of Magistrate to Hear Summary Judgment Action Involving Residential Rental Property.** — A magistrate does not have the authority to hear a summary ejectment action involving residential rental property in another county if the landlord and the tenant so provide in the lease. See opinion of Attorney General to Hon. James E. Lanning, Chief District Court Judge, 26th Judicial District, 60 N.C.A.G. 26 (1990).

**No Continued Residence Requirements.** — Continued residence in the county for which a magistrate is appointed is not a prerequisite to remain in the office of magistrate for the term of the appointment. See opinion of Attorney General to Mr. David A. Phillips, Attorney at Law, 1997 N.C.A.G. 61 (10/8/97).

## Sec. 13. Forms of action; rules of procedure.

(1) *Forms of Action.* There shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action, and in which there shall be a right to have issues of fact tried before a jury. Every action prosecuted by the people of the State as a party against a person charged with a public offense, for the punishment thereof, shall be termed a criminal action.

(2) *Rules of Procedure.* The Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division. The General Assembly may make rules of procedure and practice for the Superior Court and District Court Divisions, and the General Assembly may delegate this authority to the Supreme Court. No rule of procedure or practice shall abridge substantive rights or abrogate or limit the right of trial by jury. If the General Assembly should delegate to the Supreme Court the rule-making power, the General Assembly may, nevertheless, alter, amend, or repeal any rule of

procedure or practice adopted by the Supreme Court for the Superior Court or District Court Divisions.

**History.** — The provisions of this section are similar to those to Art. IV, § 11, Const. 1868, as that article was rewritten in 1962.

**Legal Periodicals.** — For article, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

For article, "Why the North Carolina Court of Appeals Should Have a Procedure for Sitting En Banc," see 75 N.C.L. Rev. 1981 (1997).

For recent development, "The Supreme Court of North Carolina's Rulemaking Authority and the Struggle for Power: State v. Tutt," see 84 N.C. L. Rev. 2100 (2006).

## CASE NOTES

I. General Consideration.
II. Civil Actions.
III. Criminal Actions.
IV. Rules of Procedure.

### I. GENERAL CONSIDERATION.

*Editor's Note. — Some of the cases cited below were decided under former Art. IV, § 11, Const. 1868, as rewritten in 1962, and under corresponding provisions of former Art. IV prior to its 1962 revision.*

**No procedure or practice of the courts,** even those exercised pursuant to their inherent powers, may abridge a person's substantive rights. In re Alamance County Ct. Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991).

**Section Compared to N.C. Const., Art. I, § 25.** — There is not a conflict between this section and N.C. Const., Art. I, § 25, but this section is more comprehensive. Faircloth v. Beard, 320 N.C. 505, 358 S.E.2d 512 (1987), overruled in part, Jacobs v. City of Asheville, 137 N.C. App. 441, 528 S.E.2d 905 (2000).

**N.C. Const., Art. I, § 25 and this section must be read in conjunction with one another.** This section merely establishes the form and procedure for the trial of all civil actions, including the procedure of having issues of fact decided by a jury in what were formerly equity proceedings; to determine whether there exists a constitutional right to trial by jury of a particular cause of action, one looks to N.C. Const., Art. I, § 25, which ensures that there is a right to trial by jury where the underlying cause of action existed at the time of adoption of the 1868 Constitution, regardless of whether the action was formerly a proceeding in equity. Kiser v. Kiser, 325 N.C. 502, 385 S.E.2d 487 (1989).

**Sovereign Immunity.** — The concept of sovereign immunity cannot be waived by indirection or by procedural rule. Orange County v. Heath, 282 N.C. 292, 192 S.E.2d 308 (1972).

Subsection (2) of this section would require a direct and positive declaration of policy, rather than a minute procedural change in G.S. 1A-1, Rule 65, to abolish governmental immunity. Orange County v. Heath, 282 N.C. 292, 192 S.E.2d 308 (1972).

A municipal corporation's governmental immunity against a claim for damages by a party wrongfully restrained or enjoined by the municipal corporation was not abrogated by the enactment of G.S. 1A-1, Rule 65(c), providing that no security for payment of damages for wrongfully obtaining an injunction shall be required of the State or its political subdivisions, but that "damages may be awarded against such party in accord with this rule." Orange County v. Heath, 14 N.C. App. 44, 187 S.E.2d 345, aff'd, 282 N.C. 292, 192 S.E.2d 308 (1972).

**Pretrial Discovery Does Not Infringe upon Rights.** — Section 1A-1, Rule 26(b), authorizing the pretrial discovery of the existence and contents of insurance, does not subject a defendant's property to unreasonable search and seizure or authorize the taking of a defendant's property without due process of law. Marks v. Thompson, 14 N.C. App. 272, 188 S.E.2d 22, aff'd, 282 N.C. 174, 192 S.E.2d 311 (1972).

**For examination of historical development of the right to trial by jury,** see Kiser v. Kiser, 325 N.C. 502, 385 S.E.2d 487 (1989).

**Right to Request Jury Trial Under § 50-10.** — Where the parties' last pleading was filed nearly six months prior to the 1971 amendment of G.S. 50-10, the amendment did not nullify the right to request a jury trial "prior to the call of the action for trial" conferred by G.S. 50-10 at the time defendant filed the last pleading. Branch v. Branch, 282 N.C. 133, 191 S.E.2d 671 (1972).

**Three-Judge Panel for Redistricting Challenges Held Constitutional.** — Three-judge panel of superior court judges required by G.S. 1-267.1 is not a new court outside of the contemplation of N.C. Const., Art. IV, §§ 12 and 13(2), as a challenge to redistricting is a matter of procedure that lies within the purview of the General Assembly; accordingly, no new courts are created beyond those contemplated by N.C. Const., Art. IV, §§ 1, 2. Stephenson v. Bartlett, 358 N.C. 219, 595 S.E.2d 112 (2004).

**Setting Particular Venue for Challenges to Redistricting Held Constitutional.** — Supreme Court of North Carolina found no constitutional bar under N.C. Const., Art. IV, § 13(2) to the General Assembly's setting venue for redistricting challenges in the county where the capital of North Carolina is located, pursuant to G.S. 1-81.1; the court found that the provision did not affect jurisdiction, but instead, it merely established venue for challenges to redistricting. Stephenson v. Bartlett, 358 N.C. 219, 595 S.E.2d 112 (2004).

**Applied** in Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975); State v. Bennett, 59 N.C. App. 418, 297 S.E.2d 138 (1982).

**Cited** in Simmons v. Textile Workers Union, 15 N.C. App. 220, 189 S.E.2d 556 (1972); In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979); Duke Power Co. v. Winebarger, 300 N.C. 57, 265 S.E.2d 227 (1980); State v. Evans, 46 N.C. App. 327, 264 S.E.2d 766 (1980); State v. Wise, 64 N.C. App. 108, 306 S.E.2d 569 (1983); State v. Bennett, 308 N.C. 530, 302 S.E.2d 786 (1983); State v. Hudson, 331 N.C. 122, 415 S.E.2d 732 (1992); Shook v. County of Buncombe, 125 N.C. App. 284, 480 S.E.2d 706 (1997); State v. Rorie, 348 N.C. 266, 500 S.E.2d 77 (1998); State v. Sinnott, 163 N.C. App. 268, 593 S.E.2d 439, 2004 N.C. App. LEXIS 370 (2004); Holland v. Heavner, 164 N.C. App. 218, 595 S.E.2d 224, 2004 N.C. App. LEXIS 662 (2004); Hill v. West, 177 N.C. App. 132, 627 S.E.2d 662, 2006 N.C. App. LEXIS 692 (2006).

## II. CIVIL ACTIONS.

**This section abolished the distinction between actions at law and suits in equity,** leaving such rights and remedies to be enforced in the one court, which theretofore had administered simply legal rights. Peebles v. Gay, 115 N.C. 38, 20 S.E. 173 (1894). See Reynolds v. Reynolds, 208 N.C. 578, 182 S.E. 341 (1935).

**But Distinction between Principles Is Not Abolished.** — Equity is now administered in the same courts as matters of law, but the distinction between equitable and legal principles has not been abolished. Waters v. Garris, 188 N.C. 305, 124 S.E. 334 (1924); Furst & Thomas v. Merritt, 190 N.C. 397, 130 S.E. 40 (1925); Page Trust Co. v. Godwin, 190 N.C. 512, 130 S.E. 323 (1925).

This section, abolishing the distinctions between actions at law and suits in equity, does not imply that the distinctions as between law and equity are abolished. Principles of law and principles and doctrines of equity, remain the same as they have ever been; the change wrought is in the method of administering them and, in some degree, the extent of the application of them. The abolition does not destroy equitable rights and remedies, nor does it merge legal and equitable rights. Scales v. Wachovia Bank & Trust Co., 195 N.C. 772, 143 S.E. 868 (1928).

**Inapplicability of Equitable Principle to Contract Action.** — This section, providing that legal and equitable remedies be administered in the same court, does not abolish the recognized distinction in the principles applicable to each; and as an action to enforce the provisions of a contract is one at law, the equity that time is not the essence of the contract has no application. Makuen v. Elder, 170 N.C. 510, 87 S.E. 334 (1915).

**Superior Courts as Successors of Courts of Equity.** — Under this section and former Art. IV, § 20, Const. 1868, the superior courts became the successors of the courts of equity, having their jurisdiction and exercising their equitable powers unless restrained by statute. In re Estate of Smith, 200 N.C. 272, 156 S.E. 494 (1931).

**One Action to Determine Legal and Equitable Rights and Remedies.** — Legal and equitable rights and remedies are now determined in one and the same action. Woodall v. North Carolina Joint Stock Land Bank, 201 N.C. 428, 160 S.E. 475 (1931).

Animal welfare agency had standing to assert that an injunction and temporary custody order should be entered against the animal owners for the animal owners' alleged neglect and abuse of their animals despite the claim that the animal welfare agency had not suffered a legal injury itself; the North Carolina Constitution abolished the distinction between actions at law and suits in equity, leaving only one court to enforce such rights, and the legislature expressed the intent that the broadest category of persons or organizations be deemed a "real party in interest" when contesting cruelty to animals. Animal Legal Def. Fund v. Woodley, 181 N.C. App. 594, 640 S.E.2d 777, 2007 N.C. App. LEXIS 254 (2007), appeal dismissed, cert. denied, 361 N.C. 690, 652 S.E.2d 254 (2007), Animal Legal Def. Fund v. Woodley, 181 N.C. App. 594, 640 S.E.2d 777, 2007 N.C. App. LEXIS 254 (2007).

**Equitable Rights Only Enforceable by Civil Action.** — Since the passage of this section the enforcement of an equitable right, as that of subrogation, can only be maintained by a civil action. Calvert v. Peebles, 82 N.C. 334 (1880).

**Rights of Prior Lienor Not Affected.** — This section does not affect the rights of a prior lienor by a registered chattel mortgage in favor of a judgment creditor who has sold the personal property by execution under a judgment subsequent to the mortgage lien, or give the creditor a right to levy his execution instead of pursuing the equitable remedy. Rowland Hdwe. & Supply Co. v. Lewis, 173 N.C. 290, 92 S.E. 13 (1917).

**Right of Defendant to Know Nature of Demand.** — The necessity for drawing pleadings in civil actions according to a prescribed or established precedent ceased when the form of suits was abolished by this section. But one who is brought into court to answer a demand for damages or for specific property has the same fundamental right to know the nature of the demand sufficiently well to enable him, with the aid of competent counsel, to prepare his defense as he has to be informed of an accusation for which he might have to answer criminally. Conley v. Richmond & D.R.R., 109 N.C. 692, 14 S.E. 303 (1891).

**Effect of Asking for Ancillary Remedy to Which Party Is Not Entitled.** — There being but one form of action in civil cases, the fact that a plaintiff asks for one of the many remedies ancillary thereto, to which he is not entitled, does not affect the action itself, which will go on if he is entitled to any other of the remedies. Hargrove v. Harris, 116 N.C. 418, 21 S.E. 916 (1895).

**Amendment of Pleadings by Direction of Court.** — Where a good cause of action is stated for equitable relief, but is defective in form, the court may require the pleadings to be made definite and certain by amendment, the distinction between suits in equity and actions at law as to jurisdictional matters being abolished by this section. Green v. Harshaw, 187 N.C. 213, 121 S.E. 456 (1924).

**Enforcement of Contracts.** — The remedy for the enforcement of all kinds of contracts is now a civil action. Boles v. Caudle, 133 N.C. 528, 45 S.E. 835 (1903).

**Action for Money Had and Received.** — Under this section, an exception to a complaint that by its form it is for money had and received, and that the action cannot be maintained unless the money has been actually received, is untenable. Staton v. Webb, 137 N.C. 35, 49 S.E. 55 (1904).

**Action for Claim and Delivery.** — There is no such thing as an action for claim and delivery. Under this section there is but one form of action in civil cases. Hargrove v. Harris, 116 N.C. 418, 21 S.E. 916 (1895).

**Mandamus.** — There is now in this State but one form of action, and the writ of mandamus is but a process of the court in that action. August Belmont & Co. v. Reilly, 71 N.C. 260 (1874).

**No Right to Jury Trial in Equitable Distribution Action.** — No right to bring an action for equitable distribution of marital property existed prior to the adoption of the equitable distribution statutes, G.S. 50-20 and 50-21, and the language of the statutes themselves create no new right to trial by jury; therefore, there is no right to trial by jury for such an action under the Constitution of North Carolina. Kiser v. Kiser, 325 N.C. 502, 385 S.E.2d 487 (1989).

**No Right to Jury Trial in Action Seeking Attorneys' Fees Under Quantum Meruit.** — Trial court did not err in denying a law firm's request for a jury trial on the reasonable value of the attorneys who had provided legal services for a client under a contingency fee agreement and who were then discharged by the client under N.C. Const., Art. I, § 25 and N.C. Const., Art. IV, § 13; until adoption of the modern rule, clients had no right to unilaterally discharge an attorney and force him to pursue a quantum meruit claim, and the right to a jury trial under N.C. Const., Art. I, § 25 was guaranteed only in cases in which the right and the remedy were in existence when the North Carolina Constitution of 1868 was adopted. Guess v. Parrott, 160 N.C. App. 325, 585 S.E.2d 464, 2003 N.C. App. LEXIS 1798 (2003).

**No Right to Jury in Foreclosure Proceeding.** — Denial of a co-owner's motion for a jury trial in his appeal from a clerk's order allowing a foreclosure was proper because, inter alia, N.C. Const., Art. IV, § 13 did not create a constitutional right to trial by jury in all civil cases arising from controversies affecting private rights and redressing private wrongs. In re Foreclosure of Real Prop. Under Deed of Trust, — N.C. App. —, 667 S.E.2d 259, 2008 N.C. App. LEXIS 1756 (2008).

**Stockholders' Derivative Actions.** — Although stockholders' derivative actions may be equitable actions, they are actions to protect private rights and to redress private wrongs; therefore they are civil actions under this section which guarantees that parties to such actions may have questions of fact tried by juries. Faircloth v. Beard, 320 N.C. 505, 358 S.E.2d 512 (1987), overruled in part, Jacobs v. City of Asheville, 137 N.C. App. 441, 528 S.E.2d 905 (2000).

## III. CRIMINAL ACTIONS.

**"Criminal Action" and "Indictment" Synonymous.** — The terms "criminal action" and "indictment," as used in the Constitution and in the General Statutes, are synonymous. Therefore, it would be equally regular to entitle a case upon the records of the court either as "The People v. A.B. — Criminal Action," or "The State v. A.B. — Indictment." State v. Simons, 68 N.C. 378 (1873).

## IV. RULES OF PROCEDURE.

**Substantive Rights May Not Be Abridged by Rules.** — Regardless of its "procedural" subject matter, no rule of procedure or practice may be applied to abridge substantive rights. Gardner v. Gardner, 300 N.C. 715, 268 S.E.2d 468 (1980).

**The rules of the Court of Appeals are mandatory** and not directory. State v. Black, 7 N.C. App. 324, 172 S.E.2d 217 (1970).

**Authority of General Assembly over Rules in Trial Courts.** — The General Assembly has the final word on rules of practice and procedure in the trial courts of the State. State v. Campbell, 14 N.C. App. 596, 188 S.E.2d 558 (1972).

**The General Assembly was without authority to enact subdivision (d)(6) of G.S. 15A-1446,** which permits appellate review of a contention that defendant was convicted under a statute that violates the United States Constitution or the North Carolina Constitution even though no objection, exception or motion on such ground was made in the trial division, since the statute violates the provisions of subsection (2) of this section giving the Supreme Court the exclusive authority to make rules of practice and procedure for the appellate division. State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981); State v. O'Neal, 77 N.C. App. 600, 335 S.E.2d 920 (1985).

**Authority of Superior Courts Where Laws for Duties of District Attorneys Unconstitutional.** — The superior court is empowered to review the constitutionality of the statutes which prescribe the duties of the district attorney and to fashion an appropriate remedy should such statutes violate the Constitution. Simeon v. Hardin, 339 N.C. 358, 451 S.E.2d 858 (1994).

**Adoption of Procedural Rule Did Not Affect Action Already Pending.** — Given the unique constitutional and statutory responsibilities of the Supreme Court of North Carolina to promulgate rules of appellate procedure, as well as rules and standards of conduct for the judiciary, the Supreme Court of North Carolina did not exceed its authority in adopting N.C. Code Jud. Conduct, Limitation of Proceedings; however, where a judicial disciplinary action was already pending when N.C. Code Jud. Conduct, Limitation of Proceedings came into effect, the action was not barred. In re Inquiry Concerning a Judge (Brown), 358 N.C. 711, 599 S.E.2d 502, 2004 N.C. LEXIS 910 (2004).

**Conflict Between G.S. 8C-1-103(a)(2) and N.C. R. App. P. 10(b)(1).** — Constitution of North Carolina vests the Supreme Court of North Carolina with exclusive authority to make rules of practice and procedure for the appellate division of the courts; while G.S. 8C-1-103(a)(2) permitted appellate review of an evidentiary ruling even though the party failed to object at trial, since G.S. 8C-1-103(a)(2) was inconsistent with N.C. R. App. P. 10(b)(1), G.S. 8C-1-103(a)(2) failed. State v. Tutt, 171 N.C. App. 518, 615 S.E.2d 688, 2005 N.C. App. LEXIS 1313 (2005).

Constitution of North Carolina expressly vested in the Supreme Court of North Carolina the exclusive authority to make rules of procedure and practice for the Appellate Division; although G.S. 8C-1-103(a)(2) was contained in the Rules of Evidence, it was manifestly an attempt to govern the procedure and practice of the Appellate Division as it purported to determine which issues were preserved for appellate review, and to the extent it conflicts with N.C. R. App. P. 10(b)(1), G.S. 8C-1-103(a)(2) failed. State v. Oglesby, 361 N.C. 550, 648 S.E.2d 819, 2007 N.C. LEXIS 812 (2007).

**Rule-Making Authority.** — Rule-making authority was not conferred on the Court of Appeals of North Carolina but belonged exclusively with the North Carolina Supreme Court under N.C. Const., Art. IV, § 13(2); indeed, even the North Carolina General Assembly could not alter or amend the appellate rules. Stann v. Levine, 180 N.C. App. 1, 636 S.E.2d 214, 2006 N.C. App. LEXIS 2252 (2006).

Procedures of G.S. 20-38.6(a), (f) and G.S. 20-38.7(a) do not apply to the appellate division because by enacting these provisions, the General Assembly created rules which affect the procedure and practice of the superior and district court divisions only, as it is constitutionally permitted to do pursuant to N.C. Const., Art. IV, § 13, cl. 2; because the General Assembly is constitutionally authorized to create rules of procedure and practice for the superior and district courts, to prescribe the jurisdiction and powers of the district courts, and to circumscribe the jurisdiction of the superior courts, a constitutional amendment is not required for the General Assembly to promulgate a rule of procedure and practice pertaining exclusively to the superior and district courts. State v. Fowler, — N.C. App. —, 676 S.E.2d 523, 2009 N.C. App. LEXIS 832 (May 19, 2009).

## Sec. 14. Waiver of jury trial.

In all issues of fact joined in any court, the parties in any civil case may waive the right to have the issues determined by a jury, in which case the finding of the judge upon the facts shall have the force and effect of a verdict by a jury.

**Cross References.** — As to right of jury trial in certain civil cases, see N.C. Const., Art. I, § 25. As to jury trial and waiver thereof, see G.S. 1A-1, Rules 38 and 39. As to findings by the court, see G.S. 1A-1, Rule 52. As to waiver of jury trial in cases tried by reference, see G.S. 1A-1, Rule 53.

**History.** — The provisions of this section are similar to those of Art. IV, § 12, Const. 1868, as that article was rewritten in 1962.

**Legal Periodicals.** — For article, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

## CASE NOTES

***Editor's Note.*** *— Some of the cases cited below were decided under former Art. IV, § 12, Const. 1868, as rewritten in 1962, and under corresponding provisions of former Art. IV prior to its 1962 revision.*

**The right to trial by jury in civil cases may be waived.** Chesson v. Kieckhefer Container Co., 223 N.C. 378, 26 S.E.2d 904 (1943); Simmons v. Lee, 230 N.C. 216, 53 S.E.2d 79 (1949).

**Manner of waiver of jury trial is controlled by statute.** Holmes Elec. Co. v. Carolina Power & Light Co., 197 N.C. 766, 150 S.E. 621 (1929). See also, Green Sea Lumber Co. v. Pemberton, 188 N.C. 532, 125 S.E. 119 (1924).

**Waiver by Agreement.** — Where case on appeal recited that the parties agreed that the court might render judgment out of term and out of the district, and the judgment recited the same, appellant's contention that trial by the court had not been agreed upon could not be sustained, since trial by jury would be impossible under the agreement that judgment might be rendered out of term and out of the district. Odom v. Palmer, 209 N.C. 93, 182 S.E. 741 (1935).

**Waiver by Consent to Pay Additur.** — While it may be suggested that the practice of additur deprives a defendant of his constitutional right to a jury trial, the obvious answer is that the defendant can waive that right, which he does when he consents to pay the additur, since in this State the parties to a civil action have a right to waive a jury trial. Caudle v. Swanson, 248 N.C. 249, 103 S.E.2d 357 (1958).

**Attachment Proceedings.** — In attachment and other ancillary proceedings it is competent for the court to find the facts from the affidavits and other evidence; and a party consenting to this mode of trial cannot afterwards demand a jury trial. Pasour v. Linberger, 90 N.C. 159 (1884).

**Special Proceeding to Establish Boundary Line.** — As to defendant's waiver of jury trial by failure to tender pertinent issues, see Simmons v. Lee, 230 N.C. 216, 53 S.E.2d 79 (1949).

**Party with Right to Traverse Allegations Cannot Be Deprived of Jury Trial.** — A party charged with the maintenance of a public nuisance has a right to traverse the factual allegations of the complaint. If he does so, he cannot be deprived of his right to a jury trial on the issues raised by the pleadings. State ex rel. Bowman v. Malloy, 264 N.C. 396, 141 S.E.2d 796 (1965).

**It was error for trial court to determine issues of fact** raised by the pleadings in the absence of waiver of the constitutional and statutory right to a trial by jury, there being no question of reference. Sparks v. Sparks, 232 N.C. 492, 61 S.E.2d 356 (1950).

**Trial judge's findings of fact based upon a misapprehension** of applicable law will be set aside on the theory that the evidence should be considered in its true legal light. Security Ins. Group v. Parker, 289 N.C. 391, 222 S.E.2d 437 (1976).

**Judge Had No Authority to Affirm Order of Assistant Clerk which Effectively Determined Issue of Fact.** — Where there was nothing in the record to indicate that petitioner and respondent waived their constitutional and statutory rights to have the issue of fact joined on the pleadings tried by a jury, and there was no question of reference, the judge had no authority to enter an order affirming the order of the assistant clerk of the superior court, which in effect was a determination by the judge of the issue of fact raised by the pleadings and a finding by him that money deposited in the office of the clerk of the superior court was funds belonging to a decedent and an order that said money be distributed to the administrator c.t.a. of her last will and testament. In re Estate of Wallace, 267 N.C. 204, 147 S.E.2d 922 (1966).

**Findings of Trial Court Are Conclusive.** — Where a jury trial is waived, the findings by the court upon conflicting evidence are conclusive under this section, and are not subject to review upon appeal. Barringer v. Wilmington Sav. & Trust Co., 207 N.C. 505, 177 S.E. 795 (1935).

When the right to a jury trial is waived, the facts found by the judge have the force and effect of a verdict by a jury. Upon appropriate assignments of error the Supreme Court may examine the evidence to ascertain if there is any to support the verdict of a jury. It may likewise, upon appropriate assignments, ascertain if the verdict is sufficient to support the judgment, but it cannot enlarge or diminish findings which constitute the verdict. Cauble v. Bell, 249 N.C. 722, 107 S.E.2d 557 (1959).

The Supreme Court has the right to review findings of fact made with respect to interlocutory orders denying or granting injunctive relief. However, where the judgment is a final determination of the rights of the parties, the mere fact that equitable (injunctive) relief is granted gives the Supreme Court no authority to modify findings determinative of issues of fact raised by the pleadings. Cauble v. Bell, 249 N.C. 722, 107 S.E.2d 557 (1959).

**Applied** in Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972); Hinson v. Hinson, 17 N.C. App. 505, 195 S.E.2d 98 (1973); Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975); Whitaker v. Earnhardt, 26 N.C. App. 736, 217 S.E.2d 125 (1975).

**Cited** in Branch v. Branch, 282 N.C. 133, 191 S.E.2d 671 (1972).

## Sec. 15. Administration.

The General Assembly shall provide for an administrative office of the courts to carry out the provisions of this Article.

**History.** — The provisions of this section are similar to those of Art. IV, § 13, Const. 1868, as that article was rewritten in 1962.

### CASE NOTES

**Cited** in In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

## Sec. 16. Terms of office and election of Justices of the Supreme Court, Judges of the Court of Appeals, and Judges of the Superior Court.

Justices of the Supreme Court, Judges of the Court of Appeals, and regular Judges of the Superior Court shall be elected by the qualified voters and shall hold office for terms of eight years and until their successors are elected and qualified. Justices of the Supreme Court and Judges of the Court of Appeals shall be elected by the qualified voters of the State. Regular Judges of the Superior Court may be elected by the qualified voters of the State or by the voters of their respective districts, as the General Assembly may prescribe.

**History.** — The provisions of this section are similar to those of Art. IV, § 14, Const. 1868, as that article was rewritten in 1962.

**Defeated Amendment Proposals.** — An amendment proposed by Session Laws 1985, c. 768, s. 6 and defeated at the primary election held on May 6, 1986, would have amended this section by adding "except that those elected in 1982, 1984, 1986, and 1988 shall hold office for terms of nine years" at the end of the first sentence.

**Legal Periodicals.** — For comment on changing North Carolina's method of judicial selection, see 25 Wake Forest L. Rev. 253 (1990).

For article, "Tuesday, February 11, 1868: The Day North Carolina Chose Direct Election of Judges," see 70 N.C.L. Rev. 1825 (1992).

### CASE NOTES

**The one man, one vote rule does not apply to the State judiciary,** and therefore a mere showing of a disparity among the voters or in the population figures of the district would not be sufficient to strike down the election procedure for superior court judges. A showing of an arbitrary and capricious or invidious action or distinction between citizens and voters would be required. Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd, 409 U.S. 807, 93 S. Ct. 43, 34 L. Ed. 2d 68 (1972).

**Election of Judges Not Required by Federal Constitution.** — North Carolina could by her Constitution provide for the appointment of all State judges without violating any provision of the federal Constitution. The election of superior court judges is not a necessary characteristic of a republican form of government and is not required by the Constitution of the United States. This is a political rather than a judicial question. Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd, 409 U.S. 807, 93 S. Ct. 43, 34 L. Ed. 2d 68 (1972).

**Election to Fill Unexpired Judicial Term of Office.** — Section 163-9, insofar as it provides for elections of judges to fill only the unexpired portions of eight-year terms, is authorized by N.C. Const., Art. IV, § 19; therefore, it does not violate this section, providing that judges "shall be elected ... and shall hold office for terms of eight years." Brannon v. North Carolina State Bd. of Elections, 331 N.C. 335, 416 S.E.2d 390 (1992).

**Session Laws 1987, c. 509, which amended G.S. 7A-41, did not deny certain citizens their "fundamental right"** under this section to vote for judges at the expiration of their eight-year terms of office; the right to vote per se is not a fundamental right under North Carolina's Constitution; instead, once the right to vote is conferred, the equal right to vote is a fundamental right. State ex rel. Martin v. Preston, 325 N.C. 438, 385 S.E.2d 473 (1989).

**By enacting Session Laws 1987, c. 509, the legislature eliminated staggered terms within multi-seat judicial districts** by creating a one-time interim or hiatus between certain terms of office; as the Constitution anticipates such "hold over" situations by providing that elected judges remain in office "until their successors are elected and qualified," the act was not unconstitutional. State ex rel. Martin v. Preston, 325 N.C. 438, 385 S.E.2d 473 (1989).

**Validity of Superior Court Election, Rotation, and Residency Provisions.** — There can be no doubt as to the validity under the federal Constitution of the provisions of the North Carolina Constitution requiring the election of superior court judges by districts or statewide as prescribed by the legislature, or that the State be divided into divisions and districts and judges rotate among the districts, or that they reside in their respective districts. Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd, 409 U.S. 807, 93 S. Ct. 43, 34 L. Ed. 2d 68 (1972).

A superior court judge is a hybrid official with both local and statewide functions and authority. The requirement that he reside in the district from which he is elected is a matter of convenience, making him available to hear emergency matters, and convenience is an essential factor in arranging an effective judicial system. He rotates among the districts of his division, and may be assigned beyond his division by the Chief Justice. Thus, there is a reasonable basis for the election procedure requiring him to be nominated in the primary election and elected in the general election by statewide vote, and it serves and achieves a legitimate State purpose and is not arbitrary and capricious. Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd, 409 U.S. 807, 93 S. Ct. 43, 34 L. Ed. 2d 68 (1972).

**Cited** in Republican Party v. Hunt, 841 F. Supp. 722 (E.D.N.C.); Republican Party v. Martin, 980 F.2d 943 (4th Cir. 1992).

## Sec. 17. Removal of Judges, Magistrates and Clerks.

(1) *Removal of Judges by the General Assembly.* Any Justice or Judge of the General Court of Justice may be removed from office for mental or physical incapacity by joint resolution of two-thirds of all the members of each house of the General Assembly. Any Justice or Judge against whom the General Assembly may be about to proceed shall receive notice thereof, accompanied by a copy of the causes alleged for his removal, at least 20 days before the day on which either house of the General Assembly shall act thereon. Removal from office by the General Assembly for any other cause shall be by impeachment.

(2) *Additional method of removal of Judges.* The General Assembly shall prescribe a procedure, in addition to impeachment and address set forth in this section, for the removal of a Justice or Judge of the General Court of Justice for mental or physical incapacity interfering with the performance of his duties which is, or is likely to become, permanent, and for the censure and removal of a Justice or Judge of the General Court of Justice for wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

(3) *Removal of Magistrates.* The General Assembly shall provide by general law for the removal of Magistrates for misconduct or mental or physical incapacity.

(4) *Removal of Clerks.* Any Clerk of the Superior Court may be removed from office for misconduct or mental or physical incapacity by the senior

regular resident Superior Court Judge serving the county. Any Clerk against whom proceedings are instituted shall receive written notice of the charges against him at least 10 days before the hearing upon the charges. Any Clerk so removed from office shall be entitled to an appeal as provided by law. (1971, c. 560, s. 1.)

**History.** — The provisions of this section are similar to those of Art. IV, § 15, Const. 1868, as that article was rewritten in 1962.

**Legal Periodicals.** — For article, "The Discipline and Removal of Judges in North Carolina," see 4 Campbell L. Rev. 1 (1981).

## CASE NOTES

**Subsection (1) Provides Only for Removal from Office.** — When a justice or judge is removed for incapacity, subsection (1) of this section imposes no sanction other than removal from office. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

**Purpose of Subsection (2).** — The purpose of subsection (2) of this section is not so much to change the consequences of removal as it is to provide a "procedure in addition to impeachment and address" which will accomplish the goals which formerly could be accomplished only through the cumbersome and antiquated machinery of impeachment. It neither specifies a tribunal nor directs the creation of an authority for this purpose. It merely commands the legislature, in its discretion, to provide a new remedy as an adjunct to the cumbersome, ancient and impractical remedy of impeachment. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Recognizing the need for a method of removal better than impeachment or address, the General Assembly, following the lead of many of the states, submitted subsection (2) as a constitutional amendment authorizing an additional method of removal of judges. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

The mischief to be cured by subsection (2) of this section was the inefficiency of removal proceedings under the impeachment and address provisions of the Constitution, not the remedies. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

**Subsection (2) of this section must be read in connection with the impeachment provisions of this Article,** which it was intended to supplement. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

**Conferral of Original Jurisdiction over Removal of Judges On Supreme Court.** — Ratification of the amendment adding subsection (2) of this section carried with it an expression of the will of the people that the Constitution be amended so as to empower the legislature to confer upon the Supreme Court original jurisdiction over the censure and removal of judges. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

While subsection (2) of this section, which is a positive mandate to the legislature to provide a procedure in addition to impeachment for the removal and censure of judges and justices, does not expressly authorize the legislature to confer original jurisdiction upon the Supreme Court over the censure and removal of judges, by clear implication it grants to the legislature authority to confer such jurisdiction upon the Supreme Court. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

**Disqualification for Causes Other than Disability Authorized.** — Subsection (2) of this section authorizes the General Assembly to disqualify from holding further judicial office a justice or judge who has been removed for causes other than mental or physical disability. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

**Codes of judicial conduct may usefully be consulted** to give meaning to the constitutional standards. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

**When Conduct Is Prejudicial to Administration of Justice.** — Whether the conduct of a judge may be characterized as prejudicial to the administration of justice and bringing the judicial office into disrepute depends not so much upon the judge's motives but more on the conduct itself, the results thereof and the impact such conduct might reasonably have upon knowledgeable observers. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

**Personal Benefit Irrelevant.** — Whether a judge receives any personal benefit from his conduct is wholly irrelevant to an inquiry into the conduct of a judicial officer. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

The fact that a judge received no personal benefit, financial or otherwise, from his conduct does not preclude his conduct from being prejudicial to the administration of justice and bringing the judicial office into disrepute. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

**Disposition of cases for reasons other than an honest appraisal** of the facts and the law, as disclosed by the evidence presented, will amount to conduct prejudicial to the proper administration of justice whenever and however it may be defined or whoever does the defining. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

**Judge's execution judgments, allowing limited driving privileges under § 20-179 upon a mere ex parte request** without making any effort or conducting any inquiry to ascertain whether the facts recited in the judgments were true and whether he was lawfully entitled to enter the judgments, and without giving the State an opportunity to be heard, when in truth the judgments were supported neither in fact nor in law and were beyond the judge's jurisdiction to enter, constituted a gross abuse of important provisions of the motor vehicle statutes and amounted to conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

**Article 30 of Chapter 7A (G.S. 7A-375 et seq.) Is Constitutional.** — In view of the constitutional mandate in subsection (2) of this section that the General Assembly shall prescribe a procedure for the censure and removal of judges in addition to impeachment and address as provided in subsection (1), respondent's contention that the General Assembly, in enacting Article 30 of Chapter 7A (G.S. 7A-375 et seq.), abrogated its legislative duties by unconstitutionally delegating them to the Judicial Standards Commission, a creature of the General Assembly, was without merit. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Article 30 of Chapter 7A (G.S. 7A-375 et seq.) is not unconstitutional because enacted in advance of the ratification of this section, since the General Assembly has the power to enact a statute not authorized by the present Constitution where the statute is passed in anticipation of an amendment authorizing it or provides that it shall take effect upon the adoption of such an amendment. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

The Judicial Standards Commission Act, Chapter 7A, Article 30 (G.S. 7A-375 et seq.) is constitutional and, under that Article, the Supreme Court is vested with jurisdiction to act in a case involving the removal from office of a judge. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

**And Supreme Court Action Pursuant to such Authority Does Not Violate Constitution.** — By accepting and acting upon the original jurisdiction authorized by the people under subsection (2) of this section and conferred by the legislature, the Supreme Court does not usurp power constitutionally reserved to another branch of government. Thus, the exercise of such jurisdiction does not violate the constitutional doctrine of separation of powers. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

**Grounds for suspension or removal of a magistrate** are the same as for a judge of the General Court of Justice. In re Kiser, 126 N.C. App. 206, 484 S.E.2d 441 (1997).

**Magistrate properly removed from office for engaging in willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute** where he aided and abetted a minor in the possession of alcohol. In re Kiser, 126 N.C. App. 206, 484 S.E.2d 441 (1997).

**Applied** in In re Edens, 290 N.C. 299, 226 S.E.2d 5 (1976).

**Cited** in In re Stuhl, 292 N.C. 379, 233 S.E.2d 562 (1977); In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978); State v. Greer, 58 N.C. App. 703, 294 S.E.2d 745 (1982); In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

## Sec. 18. District Attorney and prosecutorial districts.

(1) *District Attorneys.* The General Assembly shall, from time to time, divide the State into a convenient number of prosecutorial districts, for each of which a District Attorney shall be chosen for a term of four years by the qualified voters thereof, at the same time and places as members of the General Assembly are elected. Only persons duly authorized to practice law in the courts of this State shall be eligible for election or appointment as a District Attorney. The District Attorney shall advise the officers of justice in his district, be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district, perform such duties related to appeals therefrom as the Attorney General may require, and perform such other duties as the General Assembly may prescribe.

(2) *Prosecution in District Court Division.* Criminal actions in the District Court Division shall be prosecuted in such manner as the General Assembly may prescribe by general law uniformly applicable in every local court district of the State. (1973, c. 394, s. 1; 1983, c. 298, s. 2.)

**History.** — The provisions of this section are similar to those of Art. IV, § 16, Const. 1868, as that article was rewritten in 1962.

**Defeated Amendment Proposals.** — An amendment proposed by Session Laws 1981, c. 504, and defeated at the general election held in 1982, would have substituted "at the places and on the day prescribed by law" for "at the same time and places as members of the General Assembly are elected" at the end of the first sentence of subsection (1).

An amendment proposed by Session Laws 1985, c. 768, s. 7, and defeated at the primary election held on May 6, 1986, would have amended this section by adding "except that those elected in 1986 and 1988 shall serve for a term of five years" at the end of the first sentence of subsection (1).

An amendment proposed by Session Laws 1985, c. 768, s. 9.1(1), and defeated at the primary election held on May 6, 1986, would have amended this section by adding "except in 1988 at the same time and places as members of the United States House of Representatives are elected" at the end of the first sentence of subsection (1).

## CASE NOTES

**A solicitor (now district attorney) is the most responsible officer of the court** and has been spoken of as its "right arm." He is a constitutional officer and his duties are presented by the Constitution. State v. McAfee, 189 N.C. 320, 127 S.E. 204 (1925); State v. Carden, 209 N.C. 404, 183 S.E. 898, cert. denied, 298 U.S. 682, 56 S. Ct. 960, 80 L. Ed. 1402 (1936), decided under Art. IV, § 23, Const. 1868, prior to the 1962 revision of the article.

**The clear mandate of this section** is that the responsibility and authority to prosecute all criminal actions in the superior courts is vested solely in the several district attorneys of the State. State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991).

**Delegation of Prosecutorial Function.** — The elected district attorney may, in his or her discretion and where otherwise permitted by law, delegate the prosecutorial function to others. State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991).

**Discretion of District Attorney.** — While the district attorney has broad discretion to decide in a homicide case whether to try defendant for first-degree murder, second-degree murder, or manslaughter, he/she has no discretion whether to try defendant capitally or noncapitally for first-degree murder. State v. Rorie, 348 N.C. 266, 500 S.E.2d 77 (1998).

**District Attorney's Lack of Discretion in Capital Cases Not Unconstitutional.** — Section 15A-2000 does not conflict with this section; in other words, the district attorney's lack of discretion as to whether to try a defendant capitally or noncapitally for first-degree murder does not impermissibly conflict with the prosecutor's constitutional duty to prosecute criminal actions on behalf of the State, although he does have broad discretion in a homicide case to determine whether to try a defendant for first-degree murder, second-degree murder, or manslaughter. State v. Blakeney, 352 N.C. 287, 531 S.E.2d 799, 2000 N.C. LEXIS 528 (2000), cert. denied, 531 U.S. 1117, 121 S. Ct. 868, 148 L. Ed. 2d 780 (2001).

**Public Nuisances.** — The State, through the district attorney, has not only the authority, but also as an advocate of the State's interest in protecting society, an implied duty to bring public nuisance actions. Whitfield v. Gilchrist, 126 N.C. App. 241, 485 S.E.2d 61 (1997), rev'd on other grounds, 348 N.C. 39, 497 S.E.2d 412 (1998).

**Authority of Trial Court Exceeded.** — The trial court exceeded its authority and invaded the province of an independent constitutional officer when it ordered the district attorney to request that the Attorney General prosecute defendant in a capital case. State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991).

The trial court exceeded its authority by ordering that in order to avoid the possibility or impression of any conflict of interest, the district attorney and his entire staff must withdraw from a capital case and have no further participation either directly or indirectly with regard to the case. State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991).

**Construction with Other Statutes.** — Section 7A-66 does not violate the Constitution of North Carolina; the superior court had jurisdiction to remove district attorney. In re Spivey, 345 N.C. 404, 480 S.E.2d 693 (1997).

**When G.S. 114-11.6 is read in pari materia with this section,** it is apparent that our Constitution and statutes give the district attorneys of the State the exclusive discretion and authority to determine whether to request, and thus permit, the prosecution of any individual case by the Special Prosecution Division. State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991).

**Section 114-11.6 authorizes the several elected district attorneys of the State** to permit the Special Prosecution Division of the Office of the Attorney General to prosecute individual criminal cases in their prosecutorial districts. State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991).

**Standing to Challenge District Attorney's Participation.** — Magistrate did not have standing to challenge involvement of the District Attorney in magistrate's removal proceeding, where, had trial court the inherent authority to appoint an independent counsel, magistrate could not show that a different result would have occurred. In re Ezzell, 113 N.C. App. 388, 438 S.E.2d 482 (1994).

**Removal of District Attorneys.** — Neither this section nor any other provision of the Constitution of North Carolina prohibits the General Assembly from enacting a statutory method for the removal of district attorneys from office, so long as district attorneys whose removal from office is sought are accorded due process of law. In re Spivey, 345 N.C. 404, 480 S.E.2d 693 (1997).

**Employment of Private Counsel.** — A district attorney's decision to employ private counsel to assist the district attorney in bringing a public nuisance action in the name of the State is similar to a district attorney's decision to permit a private attorney to assist in a criminal action; thus, the state constitution and this section, G.S. 7A-61 and G.S. 147-89 do not prohibit employing private counsel. Whitfield v. Gilchrist, 126 N.C. App. 241, 485 S.E.2d 61 (1997), rev'd on other grounds, 348 N.C. 39, 497 S.E.2d 412 (1998).

**Exclusive Jurisdiction to Prosecute Criminal Actions.** — The authority to prosecute criminal actions in North Carolina courts rests exclusively with the district attorneys of the State. In re 1990 Red Cherokee Jeep, 131 N.C. App. 108, 505 S.E.2d 588 (1998).

**Forfeiture Proceedings.** — Only district attorneys are to prosecute forfeiture proceedings. In re 1990 Red Cherokee Jeep, 131 N.C. App. 108, 505 S.E.2d 588 (1998).

**Applied** in State v. Sexton, 352 N.C. 336, 532 S.E.2d 179, 2000 N.C. LEXIS 529 (2000); State v. Wilson, 139 N.C. App. 544, 533 S.E.2d 865, 2000 N.C. App. LEXIS 988 (2000).

**Cited** in State v. Rogers, 68 N.C. App. 358, 315 S.E.2d 492 (1984); Simeon v. Hardin, 339 N.C. 358, 451 S.E.2d 858 (1994); Caudill v. Dellinger, 129 N.C. App. 649, 501 S.E.2d 99 (1998); State v. Summers, 132 N.C. App. 636, 513 S.E.2d 575, 1999 N.C. App. LEXIS 275 (1999); State v. Ward, 354 N.C. 231, 555 S.E.2d 251, 2001 N.C. LEXIS 1097 (2001).

## Sec. 19. Vacancies.

Unless otherwise provided in this Article, all vacancies occurring in the offices provided for by this Article shall be filled by appointment of the Governor, and the appointees shall hold their places until the next election for members of the General Assembly that is held more than 60 days after the vacancy occurs, when elections shall be held to fill the offices. When the unexpired term of any of the offices named in this Article of the Constitution in which a vacancy has occurred, and in which it is herein provided that the Governor shall fill the vacancy, expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill that vacancy for the unexpired term of the office. If any person elected or appointed to any of these offices shall fail to qualify, the office shall be appointed to, held, and filled as provided in case of vacancies occurring therein. All incumbents of these offices shall hold until their successors are qualified. (1985 (Reg. Sess., 1986), c. 920, s. 2.)

**History.** — The provisions of this section are similar to those of Art. IV, § 17, Const. 1868, as that article was rewritten in 1962.

**Defeated Amendment Proposals.** — An amendment proposed by Session Laws 1981, c. 504, and defeated at the general election held in 1982, would have substituted "statewide general election" for "election for members of the General Assembly" near the end of the first and second sentences and would have inserted "the" preceding "case of vacancies occurring therein" at the end of the third sentence.

### CASE NOTES

**Amendment to G.S. 7A-16 Held Unconstitutional.** — Amendment to G.S. 7A-16 effected by Session Laws 2000-67, s. 15.5, which expanded the size of the state Court of Appeals from 12 judges to 15 and which allowed the newly appointed judges to serve until the year 2005 before being required to face a retention election, was unconstitutional to the extent that it conflicted with the provisions of N.C. Const., Art. IV, § 19 requiring a judge appointed to a judicial vacancy to stand for election at the next general election; remaining portions of the statute were constitutional and could properly be severed from the unconstitutional clause. Pope v. Easley, 354 N.C. 544, 556 S.E.2d 265, 2001 N.C. LEXIS 1237 (2001).

**Nonexclusive Provision.** — This section does not exclusively govern the appointment of district court judges. Baker v. Martin, 330 N.C. 331, 410 S.E.2d 887 (1991).

**Concurrence of Senate Unnecessary in Filling Vacancies.** — The general appointing power is given to the Governor with the concurrence of the Senate; the power to fill vacancies, not otherwise provided for, is given to the Governor alone, and that, whether the legislature is in session or not, and without calling the Senate. Nichols v. McKee, 68 N.C. 429 (1873), decided under former Art. IV, § 25, Const. 1868, prior to the 1962 revision of the Article.

**Creation of Actual Vacancy by Resignation.** — Where a district court judge resigned upon the discovery of his legal infirmity under G.S. 7A-4.20, his resignation from office created an actual vacancy in that position. Hence, upon the resignation, there was no one legally entitled to hold office by virtue of an election, nor under G.S. 128-7 was there an incumbent with the legal right to continue in office until a successor was elected or appointed. The judge, therefore, created a legal as well as an actual vacancy in office under this section. People ex rel. Duncan v. Beach, 294 N.C. 713, 242 S.E.2d 796 (1978).

**Vacancy on Refusal to Accept Office.** — Where a person was elected judge of the superior court, but declined to accept the office and never qualified, there was a vacancy within the meaning of this section, and the Governor had the power to fill such vacancy by appointing a successor. People ex rel. Cloud v. Wilson, 72 N.C. 155 (1875), decided under former Art. IV, § 25, Const. 1868, prior to the 1962 revision of the Article.

**Preference May Be Given to Political Party of Vacating Judge.** — The General Assembly may require that in the interim appointment of a district court judge preference must be given to a member of the same political party as the vacating judge. Baker v. Martin, 330 N.C. 331, 410 S.E.2d 887 (1991).

Section 7A-142, which provides that candidates for a vacancy in the office of a district judge shall be members of the same political party as the vacating judge does not violate the Constitution of North Carolina. Baker v. Martin, 330 N.C. 331, 410 S.E.2d 887 (1991).

**Election to Fill Unexpired Judicial Term of Office.** — Section 163-9, insofar as it provides for elections of judges to fill only the unexpired portions of eight-year terms, is authorized by this section; therefore, it does not violate N.C. Const., Art. IV, § 16, providing that judges "shall be elected … and shall hold office for terms of eight years." Brannon v. North Carolina State Bd. of Elections, 331 N.C. 335, 416 S.E.2d 390 (1992).

**Constables.** — The provision in this section that "all incumbents of these offices shall hold until their successors are qualified" does not embrace the office of constable. State ex rel. King v. McLure, 84 N.C. 153 (1881), decided under former Art. IV, § 25, Const. 1868, prior to the 1962 revision of the Article.

**Applied** in State ex rel. Martin v. Preston, 325 N.C. 438, 385 S.E.2d 473 (1989).

## Sec. 20. Revenues and expenses of the judicial department.

The General Assembly shall provide for the establishment of a schedule of court fees and costs which shall be uniform throughout the State within each division of the General Court of Justice. The operating expenses of the judicial department, other than compensation to process servers and other locally paid non-judicial officers, shall be paid from State funds.

**History.** — The provisions of this section are similar to those of Art. IV, § 18, Const. 1868, as that article was rewritten in 1962.

## Sec. 21. Fees, salaries, and emoluments.

The General Assembly shall prescribe and regulate the fees, salaries, and emoluments of all officers provided for in this Article, but the salaries of Judges shall not be diminished during their continuance in office. In no case shall the compensation of any Judge or Magistrate be dependent upon his decision or upon the collection of costs.

**Cross References.** — As to salaries, fees and allowances, see G.S. 138-1 et seq.

**History.** — The provisions of this section are similar to those of Art. IV, § 19, Const. 1868, as that article was rewritten in 1962.

**Legal Periodicals.** — See 11 N.C.L. Rev. 256 (1933).

### CASE NOTES

**Prohibition of Salary Diminution Applies Only to Constitutional Courts.** — The provision of this section that the salaries of judges shall not be diminished during their continuance in office applies only to judges of courts existing by virtue of the Constitution and not to those established by legislative enactment. Efird v. Board of Comm'rs, 219 N.C. 96, 12 S.E.2d 889 (1941), decided under Art. IV, § 18, Const. 1868, prior to the 1962 revision of the Article.

**Duty of Supreme Court to Pass upon Right of Judge to Tax Exemption.** — It is the duty of the Supreme Court to pass upon the rights of one of the judges of the State as a citizen thereof, when he, in a case properly presented, denies the constitutional right of the State or one of its designated agencies to tax his salary paid to him as one of its judges. Long v. Watts, 183 N.C. 99, 110 S.E. 765 (1922), decided under Art. IV, § 18, Const. 1868, prior to the 1962 revision of the Article.

**Compensation for Holding Extra Term.** — Additional compensation of $100.00 given to a superior court judge for services in holding a special term was a part of his salary. Buxton v. Commissioners of Rutherford, 82 N.C. 91 (1880), decided under Art. IV, § 18, Const. 1868, prior to the 1962 revision of the Article.

## Sec. 22. Qualification of Justices and Judges.

Only persons duly authorized to practice law in the courts of this State shall be eligible for election or appointment as a Justice of the Supreme Court, Judge of the Court of Appeals, Judge of the Superior Court, or Judge of District Court. This section shall not apply to persons elected to or serving in such capacities on or before January 1, 1981. (1979, c. 638, s. 1.)

**Editor's Note.** — This section was added by constitutional amendment adopted by vote of the people at the election held November 4, 1980, and became effective January 1, 1981.

### CASE NOTES

**Cited** in Baker v. Martin, 330 N.C. 331, 410 S.E.2d 887 (1991); Comer v. Ammons, 135 N.C. App. 531, 522 S.E.2d 77, 1999 N.C. App. LEXIS 1179 (1999).

### OPINIONS OF ATTORNEY GENERAL

**A layman serving as a District Court Judge on and prior to January 1, 1981,** may resign or not seek reelection and still be qualified as a candidate for judge in a subsequent election under this section. See opinion of Attorney General to Honorable Arnold O. Jones, District Court Judge, Eighth District, 50 N.C.A.G. 107 (1981).

A layman serving as a District Court Judge on and prior to January 1, 1981, is eligible for appointment or election to the Office of Judge of the Superior Court. See opinion of Attorney General to The Honorable Arnold O. Jones, District Court Judge, 1998 N.C.A.G. 27 (6/23/98).

# ARTICLE V

# FINANCE

**Revision of Article.** — This Article was rewritten by amendment proposed by Session Laws 1969, c. 1200, s. 1, and adopted by vote of the people at the general election held Nov. 3, 1970. The amended article became effective July 1, 1973.

## Section 1. No capitation tax to be levied.

No poll or capitation tax shall be levied by the General Assembly or by any county, city or town, or other taxing unit. (1969, c. 1200, s. 1.)

### CASE NOTES

**Article V prohibits the judiciary** from taking public moneys without statutory authorization. In re Alamance County Ct. Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991).

**Constitutionality of Chapter 143, Article 7.** — Chapter 143, Article 7 (G.S. 143-117 et seq.), relating to the payment of costs by inmates of State institutions, is not unconstitutional in contravention of this section. State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975), aff'd, 292 N.C. 147, 232 S.E.2d 698 (1977).

**Cited** in State v. Sinnott, 163 N.C. App. 268, 593 S.E.2d 439, 2004 N.C. App. LEXIS 370 (2004).

## Sec. 2. State and local taxation.

(1) *Power of taxation.* The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away.

(2) *Classification.* Only the General Assembly shall have the power to classify property for taxation, which power shall be exercised only on a State-wide basis and shall not be delegated. No class of property shall be taxed except by uniform rule, and every classification shall be made by general law uniformly applicable in every county, city and town, and other unit of local government.

(3) *Exemptions.* Property belonging to the State, counties, and municipal corporations shall be exempt from taxation. The General Assembly may exempt cemeteries and property held for educational, scientific, literary, cultural, charitable, or religious purposes, and, to a value not exceeding $300, any personal property. The General Assembly may exempt from taxation not exceeding $1,000 in value of property held and used as the place of residence of the owner. Every exemption shall be on a State-wide basis and shall be made by general law uniformly applicable in every county, city and town, and other unit of local government. No taxing authority other than the General Assembly may grant exemptions, and the General Assembly shall not delegate the powers accorded to it by this subsection.

(4) *Special tax areas.* Subject to the limitations imposed by Section 4, the General Assembly may enact general laws authorizing the governing body of any county, city, or town to define territorial areas and to levy taxes within those areas, in addition to those levied throughout the county, city, or town, in order to finance, provide, or maintain services, facilities, and functions in addition to or to a greater extent than those financed, provided, or maintained for the entire county, city, or town.

(5) *Purposes of property tax.* The General Assembly shall not authorize any county, city or town, special district, or other unit of local government to levy taxes on property, except for purposes authorized by general law uniformly

applicable throughout the State, unless the tax is approved by a majority of the qualified voters of the unit who vote thereon.

(6) *Income tax.* The rate of tax on incomes shall not in any case exceed ten percent, and there shall be allowed personal exemptions and deductions so that only net incomes are taxed.

(7) *Contracts.* The General Assembly may enact laws whereby the State, any county, city or town, and any other public corporation may contract with and appropriate money to any person, association, or corporation for the accomplishment of public purposes only. (1969, c. 872, s. 1; c. 1200, s. 1.)

**Cross References.** — For provisions authorizing counties and cities to contract with and appropriate money to private entities in order to carry out any authorized public purpose, see G.S. 153A-449 and 160A-20.1, respectively. As to taxation of improvements on qualifying brownfields, see G.S. 105-277.13.

**History.** — The provisions of subsections (1), (2) and (6) of this section are similar to those of Art. V, § 3, Const. 1868, as last amended in 1962. The provisions of subsection (3) are similar to those of Art. V, § 5, Const. 1868, as last amended in 1962.

**Editor's Note.** — Pursuant to Session Laws 1969, c. 872, s. 7, and c. 1200, s. 7, subsection (6) of this section is set out as rewritten by the amendment proposed by Session Laws 1969, c. 872, s. 1 and adopted by vote of the people.

**Legal Periodicals.** — For article, "The Battle of Exemptions," see 19 N.C.L. Rev. 154 (1941).

For brief discussion of provisions of the Constitution of 1868 similar to subsections (1), (2) and (6) of this section, see 25 N.C.L. Rev. 504 (1947).

For article on property tax classification and exemption, see 37 N.C.L. Rev. 115 (1959).

For comment on the public purpose doctrine, see 3 Wake Forest Intra. L. Rev. 37 (1967).

For article, "State Jurisdiction To Tax Tangible Personal Property," see 56 N.C.L. Rev. 807 (1978).

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

For article, "A Decade of Preservation and Preservation Law," see 11 N.C. Cent. L.J. 214 (1980).

For article on the need to reform North Carolina property tax law, see 59 N.C.L. Rev. 675 (1981).

For survey of 1980 tax law, see 59 N.C.L. Rev. 1233 (1981).

For note on the rejection of the "public purpose" requirement for state tax exemption, see 17 Wake Forest L. Rev. 293 (1981).

For article, "All the News That's Fit to Tax: First Amendment Limitations on State and Local Taxation of the Press," see 21 Wake Forest L. Rev. 59 (1985).

For note on the North Carolina sales and use tax exemption for newspapers, in light of In re Village Publishing Corp., 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985), see 21 Wake Forest L. Rev. 145 (1985).

For article on mail-order ministries under the G.S. 170 charitable contribution deduction, see 11 Campbell L. Rev. 1 (1988).

For note, "Municipal Ownership of Cable Television Systems: Madison Cablevision, Inc. v. City of Morganton," see 68 N.C.L. Rev. 1295 (1990).

For note, "State v. Whittle Communications: Allowing Local School Boards To Turn On 'Channel One'," see 70 N.C.L. Rev. 1929 (1992).

For article, "The Creation of North Carolina's Limited Liability Corporation Act," see 32 Wake Forest L. Rev. 179 (1997).

For note, "Choosing Fairness over Fundamentals: How Bailey v. North Carolina Undermines the Constitutional Prohibition Against the State Contracting Away Its Power of Taxation," see 77 N.C. L. Rev. 2215 (1999).

For note, "Will North Carolina Vouch for Zelman? Examining the Constitutionality of School Vouchers in North Carolina in the Wake of Zelman v. Simons-Harris," see 81 N.C.L. Rev. 2419 (2003).

For comment, "'Don't Know What a Slide Rule Is For': The Need for a Precise Definition of Public Purpose in North Carolina in the Wake of Kelo v. City of New London," see 28 Campbell L. Rev. 291 (2006).

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## I. GENERAL CONSIDERATION.

***Editor's Note.*** *— Some of the cases cited below were decided under corresponding provisions of the Constitution of 1868, and under this section as it read before the revision of this Article by the amendment adopted Nov. 3, 1970, and effective July 1, 1973.*

**Applicability of Limitations.** — For case holding that limitations similar to those in subsections (1) to (3) of this section relate solely to the taxation of real and personal property, and are irrelevant in respect of the validity of a local sales and use tax act, see Sykes v. Clayton, 274 N.C. 398, 163 S.E.2d 775 (1968).

The equality and uniformity required by the State Constitution in property taxation does not apply to inheritance or succession taxation. Rigby v. Clayton, 274 N.C. 465, 164 S.E.2d 7 (1968). See also, In re Davis, 190 N.C. 358, 130 S.E. 22 (1925).

For case holding that the requirement of uniformity extends to license, franchise and other forms of taxation, see Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

**Taxes and Local Assessments for Public Improvements Distinguished.** — There is a distinction between local assessments for public improvements and taxes levied for purposes of general revenue. It is true that local assessments may be a species of tax, and that the authority to levy them is generally referred to the taxing power, but they are not taxes within the meaning of that term as generally understood in constitutional restrictions and exemptions. Southern Ry. v. City of Raleigh, 9 N.C. App. 305, 176 S.E.2d 21 (1970), aff'd, 277 N.C. 709, 178 S.E.2d 422 (1971).

**Police Power More Extensive Than Legislative Authority to Expend Tax Money.** — The power of the State to regulate privately owned institutions under its police power is more extensive than the authority of the legislature to expend tax money for the accomplishment of the same purpose. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

**Laches as Bar to Constitutional Challenge to 1970 Amendments.** — Where more than 18 years elapsed between the 1970 ballot and the defendants' claim of unconstitutionality of the 1970 amendments and where taxpayer stated that he did not recognize the effects of the amendment until his taxes rose in 1985, he did not claim that he was precluded from ascertaining the import of the amendment or the constitutionality of its passage before 1985, or until January 8, 1989, when he filed his answer, a county was materially prejudiced by the defendants' delay because the passage of time prevented the county from presenting evidence supporting the fact that the ballot was understandable to voters. Franklin County v. Burdick, 103 N.C. App. 496, 405 S.E.2d 783 (1991).

While the mere passage of years does not in itself entitle the plaintiff to the bar of laches, an unreasonable length of time resulting in prejudice to the opposing party does so entitle the plaintiff. Franklin County v. Burdick, 103 N.C. App. 496, 405 S.E.2d 783 (1991).

**A tax on indictments, civil suits, etc., is not a "tax"** within the meaning of this section. State ex rel. Hewlett v. Nutt, 79 N.C. 263 (1878).

**Drainage district assessments are not taxes.** Northampton County Drainage Dist. Number One v. Bailey, 326 N.C. 742, 392 S.E.2d 352 (1990).

**The North Carolina Sales and Use Tax Act** does not violate the equal protection clause of U.S. Const., Amend. XIV or the principle of equitable taxation found in this section. In re Assessment of Additional N.C. & Orange County Use Taxes, 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985).

**A bailment surcharge imposed on each case of distilled spirits** shipped from ABC warehouse to ABC stores is not a tax; the cost of liquor enforcement is a burden incident to the privilege of buying spirituous liquors in the State and such a surcharge is not unconstitutional as a tax imposed in violation of N.C. Const., Art. II, § 23 or of this section. North Carolina Ass'n of ABC Bds. v. Hunt, 76 N.C. App. 290, 332 S.E.2d 693, cert. denied, 314 N.C. 667, 336 S.E.2d 400 (1985).

**Council Could Not Be Estopped From Terminating Unauthorized Payments Without Notice.** — Where a town's resolution appropriating a certain percentage of its alcoholic beverage control revenue to county school board was outside the authority of the town council, the town council could not be estopped from terminating the unauthorized payments without notice. Watauga County Bd. of Educ. v. Town of Boone, 106 N.C. App. 270, 416 S.E.2d 411 (1992).

**Legislature had a rational basis for taxing businesses hosting live entertainment differently than moving picture shows,** as the former placed greater demands on public resources, created greater risks, and generated larger revenues than the latter. Deadwood, Inc. v. N.C. Dep't of Revenue, 356 N.C. 407, 572 S.E.2d 103, 2002 N.C. LEXIS 1114 (2002).

**Applied** in In re Forsyth County, 285 N.C. 64, 203 S.E.2d 51 (1974); Master Hatcheries, Inc. v. Coble, 21 N.C. App. 256, 204 S.E.2d 395 (1974); North Carolina ex rel. Horne v. Chafin, 62 N.C. App. 95, 302 S.E.2d 281 (1983); State v. Whittle Communications, 328 N.C. 456, 402 S.E.2d 556 (1991); Coley v. State, 360 N.C. 493, 631 S.E.2d 121, 2006 N.C. LEXIS 594 (2006).

**Cited** in In re North Carolina Forestry Found., Inc., 35 N.C. App. 414, 242 S.E.2d 492 (1978); In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979); W.R. Co. v. North Carolina Property Tax Comm'n, 48 N.C. App. 245, 269 S.E.2d 636 (1980); In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981); Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 55 N.C. App. 134, 285 S.E.2d 110 (1981); North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 302 N.C. 458, 276 S.E.2d 404 (1981); In re Southview Presbyterian Church, 62 N.C. App. 45, 302 S.E.2d 298 (1983); In re Chapel Hill Residential Retirement Center, Inc., 60 N.C. App. 294, 299 S.E.2d 782 (1983); In re City of Durham Annexation Ordinance Numbered 5991 for Area A, 69 N.C. App. 77, 316 S.E.2d 649 (1984); Hed, Inc. v. Powers, 84 N.C. App. 292, 352 S.E.2d 265 (1987); Cheape v. Town of Chapel Hill, 320 N.C. 549, 359 S.E.2d 792 (1987); Barnhill San. Serv., Inc. v. Gaston County, 87 N.C. App. 532, 362 S.E.2d 161 (1987); In re Worley, 93 N.C. App. 191, 377 S.E.2d 270 (1989); In re Moravian Home, Inc., 95 N.C. App. 324, 382 S.E.2d 772 (1989); Thrash v. City of Asheville, 95 N.C. App. 457, 383 S.E.2d 657 (1989); Edward Valves, Inc. v. Wake County, 343 N.C. 426, 471 S.E.2d 342 (1996); In re Springmoor, Inc., 348 N.C. App. 1, 498 S.E.2d 177 (1998).

## II. POWER OF TAXATION.

**A sovereign state, as one of its inherent attributes, has the power of taxation,** which must be exercised by its legislative branch. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

**A county is not a sovereign and does not have inherent power to levy taxes.** A county must derive its taxing power from the State Constitution or from the State's legislative enactments. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

**A county board of elections does not have taxing power.** Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

**The power to levy taxes is the exclusive province of the legislature,** and the superior court has no jurisdiction of an action, the nature and purpose of which is to discover, to list and to assess for taxation, property which has escaped taxation. Henderson County v. Smyth, 216 N.C. 421, 5 S.E.2d 136 (1939).

This section of the Constitution vests exclusive authority in the legislature to levy taxes, which may not be interfered with by the courts. Person v. Board of State Tax Comm'rs, 184 N.C. 499, 115 S.E. 336 (1922).

Under this Article the power to levy taxes vests exclusively in the legislative branch of the government; and it is within the exclusive power of the General Assembly to provide the method and prescribe the procedure for discovery, listing and assessing property for taxation. DeLoatch v. Beamon, 252 N.C. 754, 114 S.E.2d 711 (1960).

**Subsection (1) is a limitation upon the legislative power,** separate and apart from the limitation contained in the law of the land clause in N.C. Const., Art. I, § 19, and the due process clause of U.S. Const., Amend. XIV. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

**Application of G.S. 105-116 to Electric Cooperative Did Not Violate Rights.** — Section 105-116 taxes billings for electrical service rendered by cooperatives in the same manner as billings for service rendered by investor-owned utilities; therefore, application of the section to an electric cooperative did not violate that entity's right under N.C. Const., Art. I, § 19, this section, or N.C. Const., Art. V, § 3. Four County Elec. Membership Corp. v. Powers, 96 N.C. App. 417, 386 S.E.2d 107 (1989), cert. denied and appeal dismissed, 326 N.C. 799, 393 S.E.2d 894 (1990), cert. denied, 498 U.S. 1040, 111 S. Ct. 711, 112 L. Ed. 2d 700 (1991).

**Prejudice Not Shown.** — Taxpayers did not show that they had standing to challenge the economic incentives that the state and local governments gave to the business to locate its computer manufacturing facility in the county, under either the Uniformity of Taxation Clauses, N.C. Const., Art. V, § 2(2) and (3) or the federal Dormant Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, as the taxpayers did not show that they were prejudiced and the legislation producing the incentives, such as tax credits, promoted the permissible governmental goal of providing economic incentives to recruit business to the state in order to benefit the public. Blinson v. State, 186 N.C. App. 328, 651 S.E.2d 268, 2007 N.C. App. LEXIS 2191 (2007), review denied, appeal dismissed, 362 N.C. 355, 661 S.E.2d 240 (2008).

## III. PUBLIC PURPOSES.

### A. In General.

**Construction with N.C. Const., Art. V, § 13.** — N.C. Const., Art. V, § 2(1), providing for the exercise of the power of taxation for public purposes, does not conflict with N.C. Const., Art. V, § 13(1)(a), allowing the General Assembly to grant authority to develop airports and seaports, in such a manner that the airport and seaport facilities provision cannot be implemented as envisioned by the people of North Carolina. Piedmont Triad Airport Auth. v. Urbine, 354 N.C. 336, 554 S.E.2d 331, 2001 N.C. LEXIS 1095 (2001), cert. denied, 535 U.S. 971, 122 S. Ct. 1438, 152 L. Ed. 2d 381 (2002).

The public purpose clause of N.C. Const., Art. V, § 2(1), regarding the exercise of taxation, acts in concert with N.C. Const., Art. V, § 13(1)(a), authorizing the General Assembly to grant authority to develop airports and seaports, and all endeavors pursuant to N.C Const., Art. V, § 13(1)(a) can be fully realized insofar as they are for a public purpose or a public use, since N.C. Const., Art. V, § 2(1) does not act as a prohibition against developing and improving airports and seaports under N.C. Const., Art. V, § 13(1)(a), but rather, N.C. Const., Art. V, § 2(1) acts as a qualifier upon such undertakings. Piedmont Triad Airport Auth. v. Urbine, 354 N.C. 336, 554 S.E.2d 331, 2001 N.C. LEXIS 1095 (2001), cert. denied, 535 U.S. 971, 122 S. Ct. 1438, 152 L. Ed. 2d 381 (2002).

**Taxes may be levied only for public purposes.** Palmer v. County of Haywood, 212 N.C. 284, 193 S.E. 668, 113 A.L.R. 1195 (1937); Ramsey v. Rollins, 246 N.C. 647, 100 S.E.2d 55 (1957).

There can be no lawful tax which is not levied for a public purpose. Nash v. Town of Tarboro, 227 N.C. 283, 42 S.E.2d 209 (1947).

**The "public purpose" requirement acts as a limitation** equally upon the power to tax and the power to appropriate and expend public funds. Hughey v. Cloninger, 37 N.C. App. 107, 245 S.E.2d 543 (1978), aff'd, 297 N.C. 86, 253 S.E.2d 898 (1979).

**Meaning of "Public Purpose".** — A tax or an appropriation is for a public purpose if it is for the support of the government, or for any of the recognized objects of the government. Green v. Kitchin, 229 N.C. 450, 50 S.E.2d 545 (1948), discussed in 27 N.C.L. Rev. 500; Jamison v. City of Charlotte, 239 N.C. 682, 80 S.E.2d 904 (1954); Morgan v. Town of Spindale, 254 N.C. 304, 118 S.E.2d 913 (1961).

The term "public purpose," when used in connection with the expenditure of municipal funds from the public treasury, refers to such public purpose within the frame of governmental and proprietary power given to the particular municipality, to be exercised for the benefit, welfare and protection of its inhabitants and others coming within the municipal care. It involves reasonable connection with the convenience and necessity of the particular municipality whose aid is extended in its promotion. Greensboro-High Point Airport Auth. v. Johnson, 226 N.C. 1, 36 S.E.2d 803 (1946); Nash v. Town of Tarboro, 227 N.C. 283, 42 S.E.2d 209 (1947).

For a comprehensive discussion of the term "public purpose," see Mitchell v. North Carolina Indus. Dev. Fin. Auth., 273 N.C. 137, 159 S.E.2d 745 (1968).

The term "public purposes" is employed in the same sense in the law of taxation and in the law of eminent domain. Thus, if the General Assembly may authorize a State agency to expend public money for the purpose of aiding in the construction of a hospital facility to be leased to and ultimately conveyed to a private agency, it may also authorize the acquisition of a site for such facility by exercise of the power of eminent domain. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

Although Mitchell v. North Carolina Indus. Dev. Fin. Auth., 273 N.C. 137, 159 S.E. 2d 745 (1968), and its progeny remain pivotal in the development of the doctrine, they do not purport to establish a permanent test for determining the existence of a public purpose. Maready v. City of Winston-Salem, 342 N.C. 708, 467 S.E.2d 615 (1996).

**Concept of "Public Purpose" Expands with Changing Conditions.** — A slide-rule definition to determine the meaning of "public purpose" for all time cannot be formulated; the concept expands with the population, economy, scientific knowledge, and changing conditions. Martin v. North Carolina Hous. Corp., 277 N.C. 29, 175 S.E.2d 665 (1970); In re Denial of Approval to Issue Hous. Bonds, 307 N.C. 52, 296 S.E.2d 281 (1982).

**For a use to be public its benefits must be in common and not for particular persons,** interests, or estates; the ultimate net gain or advantage must be the public's, as contradistinguished from that of an individual or private entity. Martin v. North Carolina Hous. Corp., 277 N.C. 29, 175 S.E.2d 665 (1970); In re Denial of Approval to Issue Hous. Bonds, 307 N.C. 52, 296 S.E.2d 281 (1982).

The power to appropriate money from the public treasury is no greater than the power to levy the tax which put the money in the treasury. Both powers are subject to the constitutional proscription that tax revenues may not be used for private individuals or corporations, no matter how benevolent. Mitchell v. North Carolina Indus. Dev. Fin. Auth., 273 N.C. 137, 159 S.E.2d 745 (1968); Martin v. North Carolina Hous. Corp., 277 N.C. 29, 175 S.E.2d 665 (1970); Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

**But the fact that moneys are paid to an individual does not affect the character of the expenditure,** since the object of the expenditure and not to whom it is paid determines whether it is for a public purpose. Green v. Kitchin, 229 N.C. 450, 50 S.E.2d 545 (1948), discussed in 27 N.C.L. Rev. 500 (1949).

**When Direct Disbursement of Public Funds to Private Entity Is Permissible.** — Under subsection (7) of this section, direct disbursement of public funds to private entities is a constitutionally permissible means of accomplishing a public purpose, provided there is statutory authority to make such appropriation. Hughey v. Cloninger, 297 N.C. 86, 253 S.E.2d 898 (1979).

**Direct Assistance to Private School Is Not Permissible.** — Direct assistance to private entities such as the Dyslexia School of North Carolina, Inc., distinguishable from direct disbursements to students for educational purposes, may not be the means used to effect a public purpose. Hughey v. Cloninger, 37 N.C. App. 107, 245 S.E.2d 543 (1978), aff'd, 297 N.C. 86, 253 S.E.2d 898 (1979).

Even though the Dyslexia School of North Carolina, Inc., a private nonprofit corporation, is engaged in a clearly benevolent activity, which would not be constitutionally prohibited if provided through the public schools of Gaston County, it remains a private entity. As such, it may not receive appropriations and expenditures from public funds of Gaston County in order to achieve the desirable and commendable end of assisting in the education of the dyslexic children of Gaston County. Hughey v. Cloninger, 37 N.C. App. 107, 245 S.E.2d 543 (1978), aff'd, 297 N.C. 86, 253 S.E.2d 898 (1979).

**Legislature Initially Determines What Is Public Purpose.** — The initial responsibility for determining what is and what is not a public purpose rests with the legislature, and its findings with reference thereto are entitled to great weight. In re Denial of Approval to Issue Hous. Bonds, 307 N.C. 52, 296 S.E.2d 281 (1982).

**But Legislative Declarations Are Not Conclusive.** — A legislative declaration which asserts in general terms that the statute under consideration is enacted for a public purpose, although entitled to great weight, is not conclusive. When the facts are determined, what is a public purpose is a question of law for the court. Martin v. North Carolina Hous. Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

If an enactment is in fact for a private purpose, and therefore unconstitutional, it cannot be saved by legislative declarations to the contrary. When a constitutional question is properly presented, it is the duty of the court to ascertain and declare the intent of the framers of the Constitution, and to reject any legislative act which is in conflict therewith. In re Denial of Approval to Issue Hous. Bonds, 307 N.C. 52, 296 S.E.2d 281 (1982).

**Duty of Supreme Court to Determine Constitutionality of Appropriation.** — It is the duty and prerogative of the Supreme Court to determine whether an appropriation of tax funds is for a purpose forbidden by the Constitution of the State when that question is properly raised. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

**Taxpayer Action.** — If an act creating a corporation is unconstitutional as violative of this section and of N.C. Const., Art. I, § 19, and U.S. Const., Amend. XIV, § 1, and is void because the purpose for which the corporation was created is not a public purpose, then a taxpayer may maintain an action to restrain state officials from paying to the corporation and the corporation from using money appropriated out of the General Fund. Martin v. North Carolina Hous. Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

### B. Illustrative Cases.

**Financing of a Competitive Basketball Team And Public Auditorium.** — Agreements for the City's operation of a public auditorium/coliseum did not violate this section because they were established for a public purpose, although they increased the defendants' revenue and made the defendant-owned basketball team more competitive. Peacock v. Shinn, 139 N.C. App. 487, 533 S.E.2d 842, 2000 N.C. App. LEXIS 991 (2000), cert. denied, 353 N.C. 267, 546 S.E.2d 110 (2000).

**Cable Television System as Public Purpose.** — The provisions of Chapter 160A, Article 16, Part 1, which authorize cities to finance, acquire, construct, own, and operate a cable television system do not violate the "public purpose" clause of this section. Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 386 S.E.2d 200 (1989).

The establishment, financing, construction, operation, and maintenance of a cable television system by a municipality as authorized by Chapter 160A, Article 16, Part 1 involved a reasonable connection with the convenience and necessity of the city and benefited the public generally, as opposed to special interests or persons, and thus constituted a "public purpose" within the meaning of subsection (1) of this section. Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 386 S.E.2d 200 (1989).

**Creation of county authorities for financing pollution abatement and control facilities or industrial facilities** for private industry by the issuance of tax-exempt revenue bonds under Chapter 159A (now Chapter 159C) was not for a public purpose, and Chapter 159A (now Chapter 159C), which purported to authorize such financing, violated subsection (1) of this section. Stanley v. Department of Conservation & Dev., 284 N.C. 15, 199 S.E.2d 641 (1973).

**Education, Generally.** — Both appropriations and expenditures of public funds for the education of the citizens of North Carolina are for a public purpose. Hughey v. Cloninger, 37 N.C. App. 107, 245 S.E.2d 543 (1978), aff'd, 297 N.C. 86, 253 S.E.2d 898 (1979).

**Employees' Retirement Fund.** — A tax imposed to raise moneys for the Employees' Retirement Fund was for a public purpose, as the act provided benefits to thousands of teachers and employees of this State without discrimination, and therefore the tax did not violate this section. Bridges v. City of Charlotte, 221 N.C. 472, 20 S.E.2d 825 (1942).

**Hospital.** — The construction, maintenance and operation of a public hospital by a county is a public purpose for which funds may be provided by taxation under this section. Trustees of Watts Hosp. v. Board of Comm'rs, 231 N.C. 604, 58 S.E.2d 696 (1950).

The expenditure of tax funds for the construction of a general county hospital is for a public purpose; and a county, when authorized by the General Assembly and with the approval of a majority of the voters, has as much right to issue its bonds to provide hospital facilities for those citizens who are able to pay for the services rendered to them as it does to provide such facilities for the sick and afflicted poor. Trustees of Rex Hosp. v. Board of Comm'rs, 239 N.C. 312, 79 S.E.2d 892 (1954).

The expenditure of tax funds for the construction of a hospital to be owned and operated by the State, a county, a city, a town or some other political subdivision of the State is an expenditure for a public purpose, but the expenditure of public funds raised by taxation to finance or facilitate the financing of the construction of a hospital facility to be privately operated, managed and controlled is not an expenditure for a public purpose and is thus prohibited by this section. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

The construction and operation of a privately owned hospital is not necessarily for a public purpose within the meaning of the constitutional limitation upon the use of tax funds, and the circumstance that the privately owned hospital is not operated for profit is not determinative. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

**Hotel.** — The cost of constructing and maintaining a hotel is not a public purpose, within the meaning of this section. Nash v. Town of Tarboro, 227 N.C. 283, 42 S.E.2d 209 (1947).

**Industrial Development Bonds.** — The issuance of revenue bonds by the Industrial Development Financing Authority, pursuant to former Chapter 123A, in order to acquire sites and to construct and equip buildings and other facilities thereon for lease to private industry, such bonds to be retired by the rental payments, was not a public use or purpose for which State tax funds could be appropriated to enable the Authority to commence its operations. Mitchell v. North Carolina Indus. Dev. Fin. Auth., 273 N.C. 137, 159 S.E.2d 745 (1968).

**Inlet Relocation.** — Special assessment implemented for the relocation of an inlet was upheld under N.C. Const., Art. V, § 2, cl. 1, because the assessment was imposed for a public purpose; there was a reasonable connection with the necessity of the county based on the policy of preserving beaches, and the project benefitted the public in general. Parker v. New Hanover County, 173 N.C. App. 644, 619 S.E.2d 868, 2005 N.C. App. LEXIS 2227 (2005).

**Library.** — The levying of taxes for public libraries by the State, counties and municipal corporations is for "a public purpose" under this section. Jamison v. City of Charlotte, 239 N.C. 682, 80 S.E.2d 904 (1954).

**Municipal Airport.** — Construction and maintenance of a municipal airport for a city of more than 10,000 inhabitants, engaged in many industries and pursuits, is for a public purpose within the meaning of this section, and no right guaranteed by U.S. Const., Amend. XIV will be injuriously affected thereby. Turner v. City of Reidsville, 224 N.C. 42, 29 S.E.2d 211 (1944); City of Reidsville v. Slade, 224 N.C. 48, 29 S.E.2d 215 (1944).

**Police Training.** — An expenditure by a municipality for special training of a police officer is for a public purpose. Green v. Kitchin, 229 N.C. 450, 50 S.E.2d 545 (1948), discussed in N.C.L Rev. 500 (1949).

**Student Loans.** — Session Laws 1967, c. 1177 (G.S. 116-209.1) which authorizes the State Education Assistance Authority to issue revenue bonds and to use the proceeds therefrom for making loans to residents of this State to enable them to obtain an education in an eligible institution does not unconstitutionally authorize use of public funds in violation of this section. State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970).

**Manufacturing Incentives.** — Taxpayers failed to state a claim for relief under the Public Purpose Doctrine, N.C. Const., Art. V, § 2(1) and (7), regarding their challenge to state and local incentives provided to the business to locate its computer manufacturing facility in the county since they did not show that a public purpose was not involved; likewise, they also failed to state a claim for relief under the Exclusive Emoluments clause, N.C. Const., Art. I, § 32, for the same reason, especially since the incentives further a proper public purpose of providing economic incentives to recruit business to the state to further the general welfare of the public. Blinson v. State, 186 N.C.

App. 328, 651 S.E.2d 268, 2007 N.C. App. LEXIS 2191 (2007), review denied, appeal dismissed, 362 N.C. 355, 661 S.E.2d 240 (2008).

## IV. CLASSIFICATION.

### A. In General.

**The Constitution requires that the rule of uniformity be observed.** State ex rel. Dyer v. City of Leaksville, 275 N.C. 41, 165 S.E.2d 201 (1969).

The principles of equality and uniformity are indispensable to taxation, whether general or local. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Uniformity, in its legal and proper sense, is inseparably incident to the exercise of the power of taxation. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

**A "tax" within the meaning of the constitutional prohibition against nonuniformity** of taxation is a charge levied and collected as a contribution to the maintenance of the general government. It is imposed upon the citizens in common, at regularly recurring periods, for the purpose of providing a continuous revenue. State ex rel. Dorothea Dix Hosp. v. Davis, 292 N.C. 147, 232 S.E.2d 698 (1977).

**Requirement of Uniformity Extends to License, Franchise and Other Forms of Taxation.** — Repeated judicial interpretations extend the requirement of uniformity to license, franchise, and other forms of taxation. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Although it is not expressly provided that the tax on trades, etc., shall be uniform, yet a tax not uniform, as properly understood, would be so inconsistent with natural justice, and with the intent which is apparent in the Constitution that it may be admitted that the collection of such a tax would be restricted as unconstitutional. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

License taxes must bear equally and uniformly upon all persons engaged in the same class of business or occupation or exercising the same privileges. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Although the uniformity requirement is literally confined to taxes on property, it extends to license, franchise and other taxes. First Carolina Investors v. Lynch, 78 N.C. App. 583, 337 S.E.2d 691 (1985).

**Compliance with Rule of Uniformity under This Section Satisfies U.S. Const., Amend. XIV.** — A tax statute which meets the rule of uniformity required by the Constitution of this State likewise conforms to the requirements of U.S. Const., Amend. XIV. Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543, appeal dismissed, 368 U.S. 289, 82 S. Ct. 375, 7 L. Ed. 2d 336 (1961).

The requirements of "uniformity," "equal protection," and "due process" are, for all practical purposes, the same under both the State and federal Constitutions. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

**When Tax Is Uniform.** — A tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed. Gatlin v. Town of Tarboro, 78 N.C. 119 (1878); State v. Danenberg, 151 N.C. 718, 66 S.E. 301, 26 L.R.A. (n.s.) 890 (1909); Leonard v. Maxwell, 216 N.C. 89, 3 S.E.2d 316, appeal dismissed, 308 U.S. 516, 60 S. Ct. 175, 84 L. Ed. 439 (1939).

Taxing is required to be by a uniform rule, that is, by one and the same unvarying standard. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of assessment, as well as in the rate of taxation. But this is not all. The uniformity must be coextensive with the territory to which it applies. If a State tax, it must be uniform all over the State. If a county or city tax, it must be uniform throughout the extent of the territory to which it is applicable. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Uniformity consists in putting the same tax upon all of the same class; that is, while the same tax must be enforced upon all innkeepers, upon all railroads, and so on throughout, a tax discriminating among persons of the same class, whereby some are required to pay more than others, would lack uniformity. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Equality within the class or for those of like station and condition is all that is required to meet the test of constitutionality under subsection (2) of this section. A tax on trades, etc., must be considered uniform when it is equal upon all persons belonging to the prescribed class upon which it is imposed. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Uniformity of taxation is accomplished when the tax is levied equally and uniformly on all subjects in the same class, and the right to classify imports a difference in the subjects of taxation. Smith v. State, 349 N.C. 332, 507 S.E.2d 28 (1998).

**Uniformity with Reference to Locality and Classification.** — With reference to locality, a tax is uniform when it operates with equal force and effect in every place where the subject of it is found, and with reference to classification, it is uniform when it operates without distinction or discrimination upon all persons composing the described class. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

**Under this section uniformity in taxation relates to equality in the burden** of the State's taxpayers. In re Martin, 286 N.C. 66, 209 S.E.2d 766 (1974).

**This section does not prohibit reasonable flexibility and variety** appropriate to reasonable schemes of State taxation. In re Martin, 286 N.C. 66, 209 S.E.2d 766 (1974).

**And Scientific Uniformity Is Not Required.** — The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. In re Martin, 286 N.C. 66, 209 S.E.2d 766 (1974).

**The rule of uniformity is observed if the rate is uniform throughout each taxing authority's jurisdiction.** State ex rel. Dyer v. City of Leaksville, 275 N.C. 41, 165 S.E.2d 201 (1969).

Uniformity of taxation, as provided for by State Constitution, is required throughout the territorial limits of the taxing district. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

**Local taxation must be uniform upon the same class of subjects within the territorial limits** of the authority levying the tax. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

**Rule of uniformity is not violated by double taxation from taxes levied by different authorities** if each authority adheres to the uniformity rule in its levies. State ex rel. Dyer v. City of Leaksville, 275 N.C. 41, 165 S.E.2d 201 (1969).

**When property is within more than one taxing authority, each has the right to make its own levy.** State ex rel. Dyer v. City of Leaksville, 275 N.C. 41, 165 S.E.2d 201 (1969).

**Tax on City Property and on County Property including Property in City.** — The imposition of a tax on county property, including property within a city situated therein, to provide funds for county library purposes, and the imposition of a tax within the city to provide funds for municipal library purposes, does not violate this section, notwithstanding that a greater burden of taxation will be placed on the taxpayers of the municipality, nor does it constitute double taxation, since one tax will be imposed by the city for municipal purposes and the other by the county for county purposes. Further, double taxation is prohibited by neither the State nor federal Constitutions. Jamison v. City of Charlotte, 239 N.C. 682, 80 S.E.2d 904 (1954).

**Creation of Tax Districts Not Precluded by Rule of Uniformity.** — Sometimes it is deemed wise to create a tax district for special purposes, generally for public improvements, such as for highway taxes, bridge taxes, drainage taxes, or the like, and to fix the boundaries of such district so as to include two or more counties or towns or even to make the district wholly independent of such political boundaries. Taxing districts may be as numerous as the purposes for which taxes are levied. Equality and uniformity of taxation does not preclude the power of the State to create separate taxing districts, provided the taxes are equal and uniform within each taxing district. State ex rel. Dyer v. City of Leaksville, 275 N.C. 41, 165 S.E.2d 201 (1969).

**Wide Latitude Accorded Taxing Authorities.** — The power to classify subjects of taxation carries with it the discretion to select them, and a wide latitude is accorded taxing authorities, particularly in respect of occupational taxes, under the power conferred by this section. Charlotte Coca-Cola Bottling Co. v. Shaw, 232 N.C. 307, 59 S.E.2d 819 (1950); Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543, appeal dismissed, 368 U.S. 289, 82 S. Ct. 375, 7 L. Ed. 2d 336 (1961); Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

**Discretion in Classification.** — The power to classify subjects of taxation carries with it the discretion to select them, and a wide latitude is accorded taxing authorities. In re Champion Int'l Corp., 74 N.C. App. 639, 329 S.E.2d 691, cert. denied and appeal dismissed, 314 N.C. 540, 335 S.E.2d 15 (1985).

**Reasonableness of Classification.** — The power of the legislature to classify subjects for the purpose of taxation is flexible, and the reasonableness of any classification will generally be construed with reference to the facts of the particular case, the predominant limitation on the power to classify being that the classification must be reasonable and not arbitrary and must rest upon some substantial difference between the classes, and that the burden must be equal upon all in the same class. Southern Grain Provision Co. v. Maxwell, 199 N.C. 661, 155 S.E. 557 (1930).

The classification must not be arbitrary or unjust, but must be based on substantial and reasonable differences between the classes. Great Atl. & Pac. Tea Co. v. Doughton, 196 N.C. 145, 144 S.E. 701 (1928).

The classification of subjects for taxation must be based upon reasonable distinctions and must apply equally to all within each class defined. Snyder v. Maxwell, 217 N.C. 617, 9 S.E.2d 19 (1940). See also, C.D. Kenny Co. v. Town of Brevard, 217 N.C. 269, 7 S.E.2d 542 (1940), as to municipal taxes on trades and professions.

While the General Assembly may not establish a classification that is arbitrary or capricious, a classification is constitutional if it is founded upon a reasonable distinction or difference and bears a substantial relation to the object of the legislation. In re Martin, 286 N.C. 66, 209 S.E.2d 766 (1974).

The only limitation upon the power of classification is that the classification be founded upon reasonable, and not arbitrary, distinctions. In re Champion Int'l Corp., 74 N.C. App. 639, 329 S.E.2d 691, cert. denied and appeal dismissed, 314 N.C. 540, 335 S.E.2d 15 (1985).

A classification will be upheld if it is reasonable and not arbitrary and rests upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced will be treated alike. First Carolina Investors v. Lynch, 78 N.C. App. 583, 337 S.E.2d 691 (1985).

On review, wide latitude is accorded the General Assembly; the only limitation on its power is that the classification must be founded upon reasonable, and not arbitrary, distinctions. State v. Rippy, 80 N.C. App. 232, 341 S.E.2d 98 (1986).

**Courts to Determine Validity of Classifications.** — The uniformity rule of this section requires the courts, when the validity of a tax statute is challenged on the ground of discrimination, to ascertain if in fact there is a difference in the classes taxed. First Carolina Investors v. Lynch, 78 N.C. App. 583, 337 S.E.2d 691 (1985).

**Local Assessment Based on Benefits.** — The constitutional provision that taxation shall be equal, uniform, and (under previous constitutions provisions) within certain limits does not apply to local assessments imposed upon owners of property, who in respect to such ownership are to derive a special benefit in the local improvements for which the tax is expended. Cain v. Commissioners of Davie County, 86 N.C. 8 (1882).

While assessments on lands abutting on improved streets are not required to be uniform with all other subjects of taxation, and in view of the particular benefits, such must be uniform as to all property owners within that class to meet the constitutional requirements. City of Gastonia v. Cloninger, 187 N.C. 765, 123 S.E. 76 (1924).

**Property Is Taxable Without Regard to Ownership.** — By virtue of the provisions of this section, all property, real and personal, in this State, is subject to taxation, in accordance with a uniform rule, under laws which the General Assembly is required by the Constitution to enact, without regard to its ownership, and without regard to the purposes for which specific property is held, unless it is exempted by or under the provisions of this section. Latta v. Jenkins, 200 N.C. 255, 156 S.E. 857 (1931); Salisbury Hosp. v. Rowan County, 205 N.C. 8, 169 S.E. 805 (1933).

**The interest of a county in collecting tax revenues under former G.S. 105-281** was not within the zone of interest intended to be protected by this section; accordingly, that county could not contend that the provisions of former G.S. 105-281 violated principles of uniformity. In re Martin, 286 N.C. 66, 209 S.E.2d 766 (1974).

**Contention that G.S. 105-282.7 was invalid because its effect was to tax only the appellant** was without merit, as on its face G.S. 105-282.7 uniformly operates without discrimination or distinction upon all persons composing the described class, and as even appellant's own evidence did not show that the law applied only to appellant, but merely established that no one knew whether the statute had been applied to other taxpayers during the one year it had been in effect. In re Champion Int'l Corp., 74 N.C. App. 639, 329 S.E.2d 691, cert. denied and appeal dismissed, 314 N.C. 540, 335 S.E.2d 15 (1985).

**Subsection (32) of G.S. 105-275 does not discriminate against individual property owners** who own their property for residential purposes in violation of the rule of uniformity in taxation established under this Article. In re Barbour, 112 N.C. App. 368, 436 S.E.2d 169 (1993).

### B. Illustrative Cases.

**Assessment of tax under G.S. 105-114 against a business trust** did not violate the uniformity requirement of this section on grounds that it was similar to a limited partnership, which is not subject to the franchise tax. First Carolina Investors v. Lynch, 78 N.C. App. 583, 337 S.E.2d 691 (1985).

**Additional Sales Tax in Certain Counties.** — The Constitution does not permit State to levy a tax which discriminates in favor of or against taxpayers in the same classification, and this prohibition extends throughout the State. Hence, the State may not levy a tax in 25 counties and exempt 75 counties. Nor may the State set up a valid scheme by which that precise result is accomplished. Thus, additional 1% sales and use tax authorized by the Local Option Sales and Use Tax Act, which was a State tax, not a county tax, was unconstitutional since it was not uniformly applied to all taxpayers of the same class in all counties of the State. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Levy imposed by the Local Option Sales and Use Tax Act was discriminatory in that it required one person to pay the tax involved and exempted his competitor in a county which voted against the tax. Both Nash and Edgecombe were exempt if either voted against the tax. Uniformity is required. No provision was made for partial uniformity, and for that reason the tax authorized under former G.S. 105-164.45 was unconstitutional. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

**The capture of supplier refunds for use in establishing an expansion fund** does not constitute a tax that violates the requirements of N.C. Const., Art. V, § 2. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994).

**Contention that G.S. 105-282.7 was invalid because its effect was to tax only the appellant** was without merit, as on its face G.S. 105-282.7 uniformly operates without discrimination or distinction upon all persons composing the described class, and as even appellant's own evidence did not show that the law applied only to appellant, but merely established that no one knew whether the statute had been applied to other taxpayers during the one year it had been in effect. In re Champion Int'l Corp., 74 N.C. App. 639, 329 S.E.2d 691, cert. denied and appeal dismissed, 314 N.C. 540, 335 S.E.2d 15 (1985).

**Leasehold Interests in Government Owned Croplands and Forestlands.** — Classifying for taxation under G.S. 105-282.7 leasehold interests in government owned croplands and forestlands that are used in connection with a business conducted for profit seems eminently reasonable. In re Champion Int'l Corp., 74 N.C. App. 639, 329 S.E.2d 691, cert. denied and appeal dismissed, 314 N.C. 540, 335 S.E.2d 15 (1985).

Subsections (1) and (2) of this section, which require that taxation be done in a just and equitable manner and that no class of property be taxed except by uniform rule and that every classification be made by general law, are no bar to taxing lessee and users in forest lands owned by the State, under G.S. 105-282.7, "to the same extent as if the lessee or user owned the property," while other leasehold interests are taxed at true value. In re Champion Int'l Corp., 74 N.C. App. 639, 329 S.E.2d 691, cert. denied and appeal dismissed, 314 N.C. 540, 335 S.E.2d 15 (1985).

**Section 113-156.1, requiring managers of ocean fishing piers to obtain a license,** satisfies the requirements of uniformity, equal protection and due process under both the State and federal Constitutions, as the opportunity to establish an exclusive zone around ocean piers, pursuant to G.S. 113-185(a), and the cost to the State of enforcing this zone, distinguishes ocean piers from other piers and provides reasonable grounds for their separate license tax classification. State v. Rippy, 80 N.C. App. 232, 341 S.E.2d 98 (1986).

**Annexation of Federal Air Force Base.** — The annexation of a federal Air Force base by the City of Goldsboro did not create unconstitutional tax classes. In re Ordinance of Annexation No. 1977-4, 296 N.C. 1, 249 S.E.2d 698 (1978).

**Payment of Costs by Inmates of State Institutions.** — Chapter 143, Article 7 (G.S. 143-117 et seq.), relating to the payment of costs by the inmates of State institutions, is not unconstitutional in contravention of this section. State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975), aff'd, 292 N.C. 147, 232 S.E.2d 698 (1977).

The charges pursuant to G.S. 143-117 are not made for the support of the government, nor are they related to or limited by the necessities of government. They represent the actual cost of the care, treatment and maintenance of a particular patient. It is not unequal or unjust taxation, nor taxation at all, to require a man to be supported out of his own estate. State ex rel. Dorothea Dix Hosp. v. Davis, 292 N.C. 147, 232 S.E.2d 698 (1977).

**Provision for Collection of Taxes for Past Years.** — A law to provide for the collection of taxes for past years does not violate the provisions of this section in regard to uniformity of taxation. North Carolina R.R. v. Commissioners of Alamance, 82 N.C. 259 (1880).

**Requiring Railroads, etc., to Pay State Taxes Earlier.** — Provisions requiring railroads and other like corporations to pay their State taxes within a shorter period than those to the counties is a uniform legislative classification applying equally to all within its terms and is not objectionable as discriminatory or as a denial of the equal protection of the laws prohibited by this section. Norfolk S.R.R. v. Lacy, 187 N.C. 615, 122 S.E. 763 (1924).

**Tax Based on Volume of Business.** — A tax levied quarterly by a town, under authority of an act of the General Assembly, upon all traders doing business in the town, of $1.00 for every $1,000.00 worth of goods sold during the preceding quarter, was uniform and constitutional. Gatlin v. Town of Tarboro, 78 N.C. 119 (1878).

**Sales Tax on Satellite Service Versus Cable Service.** — G.S. 105-164.4(a)(6), which imposes a sales tax on direct-to-home satellite service, but not on cable television service, does not discriminate against satellite providers in favor of cable companies on its face and in its practical effect because the differential tax results solely from differences between the nature of the provision of satellite and cable services, and not from the geographical location of the businesses. DirecTV, Inc. v. State, 178 N.C. App. 659, 632 S.E.2d 543, 2006 N.C. App. LEXIS 1651 (2006).

**Tax Based on Counties in Which a Firm Does Business.** — An act taxing every meat packing house doing business in the State $100.00 for each county in which such business is carried on is valid. Lacy v. Armour Packing Co., 134 N.C. 567, 47 S.E. 53 (1904), aff'd, 200 U.S. 226, 26 S. Ct. 232, 50 L. Ed. 451 (1905).

**Tax Based on Size of City in Which Business Located.** — An act imposing an annual graduated license tax on the business of buying and selling fresh meats from offices, stores, vehicles, etc., in cities of 12,000, 8,000, and under 8,000 inhabitants, respectively, is not unconstitutional, as not being uniform and in not imposing a license if the business is carried on outside a city or town; it being uniform as to all within each class. State v. Carter, 129 N.C. 560, 40 S.E. 11 (1901).

**Tax on Receipt of Proceeds of Life Insurance Policy.** — Public Laws 1937, c. 127, G.S. 11, could not be construed as imposing an excise tax upon the receipt of the proceeds of life insurance policies issued to the beneficiary who retained all rights and liabilities thereunder, in addition to imposing an inheritance tax on the proceeds of policies issued to the insured or in which he retained some incidents of ownership, since such excise tax would have to be computed in accordance with a graduated scale on the basis of the amount of insurance together with the value of the estate or the legacy or the distributive share, and thus would produce inequality in the levying of such excise tax in contravention of this section. Wachovia Bank & Trust Co. v. Maxwell, 221 N.C. 528, 20 S.E.2d 840 (1942).

**Taxing Cotton by Bale.** — An act to provide improved marketing facilities for cotton, which enacts that on each bale of cotton ginned in North Carolina for two years, 25 cents shall be collected to specially guarantee the State warehouse system against loss, is not in derogation of this section. Bickett v. State Tax Comm'n, 177 N.C. 433, 99 S.E. 415 (1919).

**Exemption of Farm Products.** — The exception of farm products purchased from the producer from the return required to be made by merchants and other dealers as the basis for a license tax is not a discrimination against the products or citizens of other states; nor is it in violation of this section, which requires uniformity of taxation. State v. Stevenson, 109 N.C. 730, 14 S.E. 385 (1891); Ex parte Brown, 48 F. 435 (E.D.N.C. 1891).

**Business of Hauling Timber.** — An act requiring a license of anyone who carries on the business of hauling timber in a certain county, grading the license with reference to the number of horses driven to the wagon used, is not repugnant to this section. State v. Bullock, 161 N.C. 223, 75 S.E. 942 (1912).

**Dealers in Different Kinds of Merchandise.** — The requirement of this section that all taxes shall be uniform does not prohibit a municipality, which is empowered to tax persons engaged in merchantile business, from classifying dealers in a particular kind of merchandise separately from those whose business it is to sell other articles falling within the same generic terms. Rosenbaum v. City of Newbern, 118 N.C. 83, 24 S.E. 1 (1896).

**Fireman's Pension Fund.** — Session Laws 1957, c. 1420, creating the North Carolina Fireman's Pension Fund, violated this section for lack of uniformity, in that it exempted members of the Farmers' Mutual Fire Insurance Association from adding the tax imposed by the act to their premiums and collecting it from purchasers of their insurance, as other companies selling similar insurance were required to do by the act. American Equitable Assurance Co. v. Gold, 249 N.C. 461, 106 S.E.2d 875 (1959); In re North Carolina Fire Ins. Rating Bureau, 249 N.C. 466, 106 S.E.2d 879 (1959).

**Hotelkeepers.** — A tax is uniform and consistent with this section when it is equal on all persons in the same class; and hence a tax imposed on hotelkeepers, which exempts from taxation those whose yearly receipts are less than $1,000.00, is not unconstitutional. Cobb v. Commissioners of Durham County, 122 N.C. 307, 30 S.E. 338 (1898).

**Household Property.** — Because there is some reasonable relationship between the value of a home and the value of the household property within, the percentage method is a reasonable one in accomplishing the object of determining the market value of household property, and thus there is no violation of subsection (2) of this section. In re Bosley, 29 N.C. App. 468, 224 S.E.2d 686, cert. denied, 290 N.C. 551, 226 S.E.2d 509 (1976).

**Mechanical Vending Devices.** — While the legislature may not classify mechanical vending machines in accordance with the kinds of merchandise sold by such machines in levying privilege taxes on their use, since the manner in which the article is sold is the same in all instances and the economic advantages in this method of sale may be regarded as the same, it may classify mechanical vending devices for the purpose of taxation and make a further classification or subclassification in accordance with the quantity or kind of commodities sold by such method, when such classifications are based upon real and reasonable distinctions. Snyder v. Maxwell, 217 N.C. 617, 9 S.E.2d 19 (1940).

**Real Estate Brokers.** — Public-Local Laws 1927, c. 241, requiring real estate brokers in certain designated counties to be licensed by a real estate commission on the basis of moral character and proficiency in the public interest, and requiring payment of a license fee in addition to the statewide license required, was unconstitutional, as it applied only to real estate brokers in the designated counties and was therefore discriminatory. State v. Warren, 211 N.C. 75, 189 S.E. 108 (1937).

**Wholesale Grocers.** — A special classification by statute of wholesale grocers operating a cold storage chamber of some character for the preservation of fresh meats, as distinguished from those who handled only canned meats not requiring refrigeration, was a reasonable classification imposing an equal burden upon all of the class, and was constitutional and valid. Southern Grain Provision Co. v. Maxwell, 199

N.C. 661, 155 S.E. 557 (1930).

**Imposition of privilege tax on a live entertainment business under G.S. 105-37.1** was unconstitutional because movie theaters had been exempted from the operation of that tax without a rational basis. Deadwood, Inc. v. N.C. Dep't of Revenue, 148 N.C. App. 122, 557 S.E.2d 596, 2001 N.C. App. LEXIS 1275 (2001), appeal dismissed, cert. denied, 355 N.C. 490, 563 S.E.2d 565 (2002).

## V. EXEMPTIONS.

### A. In General.

**All property is subject to taxation unless exemption is authorized by the Constitution and laws** of the State. Piedmont Mem. Hosp. v. Guilford County, 221 N.C. 308, 20 S.E.2d 332 (1942).

**And Legislature May Not Grant Exemptions Beyond What Is Permitted in this Section.** — The provisions of the revenue act exempting property from taxation must be considered in connection with this section, since the General Assembly has no power to exempt property from taxation beyond the permissive power granted it by this section. Sir Walter Lodge, No. 411 v. Swain, 217 N.C. 632, 9 S.E.2d 365 (1940).

**Strict Construction of Exemptions.** — Statutes enacted by the General Assembly exempting specific property from taxation, because of the purposes for which such property is held and used, are and should be construed strictly, when there is room for construction against exemption and in favor of taxation. Salisbury Hosp. v. Rowan County, 205 N.C. 8, 169 S.E. 805 (1933); Piedmont Mem. Hosp. v. Guilford County, 218 N.C. 673, 12 S.E.2d 265 (1940); Harrison v. Guilford County, 218 N.C. 718, 12 S.E.2d 269 (1940).

**Tax Exemption for State and Local Government Employees' Retirement Benefits.** — The tax exemption for retirement benefits of state and local employees was a term or condition of retirement systems to which the employees had a contractual right and it did not constitute an unconstitutional contracting away of the state's sovereign power of taxation. Bailey v. State, 348 N.C. 130, 500 S.E.2d 54 (1998).

**Legislature Must Observe Basic Principle of Equality.** — The legislature, in exempting property from taxation, is required to observe the basic principle of equality, and exemptions allowed by it must be uniform within the class as required by this section. Sir Walter Lodge, No. 411 v. Swain, 217 N.C. 632, 9 S.E.2d 365 (1940).

**Educational Exemption Upheld.** — The court upheld G.S. 105-278.4, the educational exemption statute, in spite of a seminary's challenge on constitutional grounds that it applied unequally to various property tracts and violated the rule of uniformity; the four requirements of the section were reasonably objective and did not result in any hostile or systematic discrimination and, further, the exemption requirements were sufficiently enumerated. In re Southeastern Baptist Theological Seminary, Inc., 135 N.C. App. 247, 520 S.E.2d 302 (1999).

**Section Applies Only to Ad Valorem Taxes.** — Any intent or attempt, on the part of the legislature, to grant an exemption from any tax or assessment on real property, pursuant to the provisions of this section, other than for ad valorem taxes, would be without constitutional authorization. Raleigh Cem. Ass'n v. City of Raleigh, 235 N.C. 509, 70 S.E.2d 506 (1952).

This section refers solely and directly to exemptions from ad valorem taxation of property otherwise subject thereto. Sykes v. Clayton, 274 N.C. 398, 163 S.E.2d 775 (1968).

The constitutional limitations set forth in this section relate solely to the taxation of real and personal property, tangible and intangible, according to the value thereof, and are irrelevant in respect of the validity of a local sales and use tax act. Sykes v. Clayton, 274 N.C. 398, 163 S.E.2d 775 (1968).

**And Does Not Grant Exemption from Special or Local Assessments.** — Property belonging to municipal corporations is not exempt from assessment for local improvements. Raleigh Cem. Ass'n v. City of Raleigh, 235 N.C. 509, 70 S.E.2d 506 (1952).

The general rule that exemption from taxation does not mean exemption from a special or local assessment applies with respect to cemetery property. Raleigh Cem. Ass'n v. City of Raleigh, 235 N.C. 509, 70 S.E.2d 506 (1952).

Assessments on public school property for special benefits thereto, caused by improvement of the street on which it abuts, are not embraced within the prohibition of this section exempting property belonging to the State or to municipal corporations from taxation. City of Raleigh v. Raleigh City Admin. Unit, 223 N.C. 316, 26 S.E.2d 591 (1943); Raleigh Cem. Ass'n v. City of Raleigh, 235 N.C. 509, 70 S.E.2d 506 (1952).

Local assessments against lands along the streets of a city for paving and improving the streets do not fall within the intent and meaning of this section. Town of Tarboro v. Forbes, 185 N.C. 59, 116 S.E. 81 (1923).

Former G.S. 160-521, exempting railroad right-of-way property from assessment for local improvements, was not unconstitutional on grounds that it was not authorized by this section, since this section deals with the power of taxation and not with assessments for local improvements. Southern Ry. v. City of Raleigh, 9 N.C. App. 305, 176 S.E.2d 21 (1970), aff'd, 277 N.C. 709, 178 S.E.2d 422 (1971).

Excise taxes on municipal property are not prohibited. Stedman v. City of Winston-Salem, 204 N.C. 203, 167 S.E. 813 (1933).

**Property in Hands of Trustee.** — Where, in construing a devise of various property in a city, the courts decreed that the lands should be sold within a period of five years and that 55% of the proceeds should be distributed among several beneficiaries of the class exempted by this section, the property itself was not held by the beneficiaries designated, but by the trustee in trust for the purpose of sale and distribution of part of the proceeds of the sale to them, and the exemption only applied to the proceeds of the sale when received by the beneficiaries in accordance with the decree, and the lands in the hands of the trustee were subject to taxation. Latta v. Jenkins, 200 N.C. 255, 156 S.E. 857 (1931).

### B. State, County and Municipal Property.

**Provision Exempting Public Property Is Self-Executing.** — The provision of this section that property belonging to or owned by the State or municipal corporations shall be exempt from taxation is self-executing and requires no legislation to make it effective. Salisbury Hosp. v. Rowan County, 205 N.C. 8, 169 S.E. 805 (1933). See also, Piedmont Mem. Hosp. v. Guilford County, 218 N.C. 673, 12 S.E.2d 265 (1940); Raleigh Cem. Ass'n v. City of Raleigh, 235 N.C. 509, 70 S.E.2d 506 (1952).

**And Applies Regardless of Purpose for Which Property Is Held.** — Property owned by the State is exempt from ad valorem taxation by subsection (3) of this section solely by reason of State ownership. Thus, G.S. 105-278.1, requiring property owned by the State to be held exclusively for a public purpose in order to be exempt from taxation, is unconstitutional. Therefore, the Towns of Chapel Hill and Carrboro and the County of Orange may not assess ad valorem taxes against any property owned by the Univ. of North Carolina, an agency of the State, regardless of the purpose for which the property is held. In re Univ. of N.C., 300 N.C. 563, 268 S.E.2d 472 (1980).

Subsection (3) of this section provides that property "belonging to the State, counties and municipal corporations shall be exempt from taxation." It places no requirement, other than ownership, upon property to entitle it to exemption. In re Univ. of N.C., 300 N.C. 563, 268 S.E.2d 472 (1980).

The case of Redevelopment Comm'n v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968), was based on the premise that all of the Commission's property was held for public or governmental purposes; therefore, the opinion's review of prior cases interpreting the constitutional exemption for State and municipally owned property, and the court's conclusion that allowing the exemption only for property used for public or governmental purposes was correct, must be characterized as obiter dictum. In re Univ. of N.C., 300 N.C. 563, 268 S.E.2d 472 (1980).

The holdings of cases misapplying the holding of Atlantic & N.C.R.R. v. Board of Comm'rs, 75 N.C. 474 (1876), as mandating a "public purpose" requirement for exemption of State-owned property under the North Carolina Constitution, namely, Board of Fin. Control v. County of Henderson, 208 N.C. 569, 181 S.E. 636 (1935); Town of Benson v. County of Johnston, 209 N.C. 751, 185 S.E. 6 (1936); Town of Warrenton v. Warren County, 215 N.C. 342, 2 S.E.2d 463 (1939); and City of Winston-Salem v. Forsyth County, 217 N.C. 704, 9 S.E.2d 381 (1940), must be considered not in keeping with the rationale expressed in this case and in opinions of the Court of Appeals. In re Univ. of N.C., 300 N.C. 563, 268 S.E.2d 472 (1980).

**When Exemption Attaches.** — The quality of exemption attaches to property as soon as it is lawfully acquired and remains with such property so long as it is owned by the municipal corporation, without regard to the purpose for which it was acquired or was held. Town of Andrews v. Clay County, 200 N.C. 280, 156 S.E. 855 (1931).

**Corporation, to Be Exempt, Must Be Subordinate Branch of State or Local Government.** — In order to come within the constitutional orbit of tax exemption, a corporation must be an instrumentality, an agent, a department, or an arm of the State in the sense of being at least a subordinate branch of the State government or of a local subdivision thereof and subject to governmental visitation and control, so that ordinarily the interests and franchises pertaining to the corporation are either the exclusive property of the government itself or are under the exclusive control of some agency or political subdivision thereof. Carolina-Virginia Coastal Hwy. v. Coastal Tpk. Auth., 237 N.C. 52, 74 S.E.2d 310 (1953).

Because a limited liability company was wholly controlled by subsidiary corporations of a Housing Authority, the property belonged to the Housing Authority for the purposes of G.S. 105-278.1(b); therefore, the property was exempted from ad valorem taxation according to N.C. Const., Art. V, § 2(3) and G.S. 105-278.1. In re Appeal of Fayette Place LLC, — N.C. App. —, 668 S.E.2d 354, 2008 N.C. App. LEXIS 2027 (2008).

**Corporation Composed of Shareholders Is Not a Municipal Corporation.** — A municipal corporation is one designed to create within a prescribed territory a local government of the people therein, as a part of that exercised by the State, with certain and defined restrictions, and this section, exempting municipal corporations from taxation, does not include within its meaning or intent a corporation composed of shareholders, which in its form and controlling features is a business enterprise upon which municipal powers have been incidentally conferred in promotion of its primary purpose. Southern Ass'y v. Palmer, 166 N.C. 75, 82 S.E. 18 (1895).

**Drainage Districts Are Not Municipal Corporations.** — Drainage districts are not regarded as municipal corporations within the purview of this section, and a legislative act exempting their bonds from taxation violates the uniform rule as to taxation required by this section. Drainage Comm'rs v. C.A. Webb & Co., 160 N.C. 594, 76 S.E. 552 (1912).

**A redevelopment commission is a municipal corporation** for the purpose of tax exemption. Redevelopment Comm'n v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968), criticized on other grounds in In re Univ. of N.C., 300 N.C. 563, 268 S.E.2d 472 (1980).

**Property owned by the Medical Care Commission,** including hospital facilities leased to private nonprofit associations for operation, is property owned by the State within the meaning of this constitutional provision, making the exemption of such property from taxation mandatory. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

**Realty acquired for purposes of a rural housing authority is exempt** from taxation under this section. Mallard v. Eastern Carolina Regional Hous. Auth., 221 N.C. 334, 20 S.E.2d 281 (1942).

### C. Exemption of Property by General Assembly.

**Provision as to Exemption of Property Used for Educational, etc., Purposes Is Not Self-Executing.** — The provision of this section that the General Assembly may exempt from taxation property held for educational, scientific, literary, charitable or religious purposes is a grant of power and is not self-executing, and the power of the legislature to prescribe such exemptions is limited by the terms of the grant. Piedmont Mem. Hosp. v. Guilford County, 218 N.C. 673, 12 S.E.2d 265 (1940).

Under subsection (3) of this section, the legislature may exercise, to the full extent or in part, the power to exempt from taxation property held for educational, scientific, literary, charitable or religious purposes, or may decline to exempt such property at all. The constitutional provision being in the disjunction, the legislature may exempt the property up to a certain value and tax all above it, and may also tax property held for one of the purposes named and exempt that held for others. Congregation of United Brethren v. Commissioners of Forsyth County, 115 N.C. 489, 20 S.E. 626 (1894). See also, Salisbury Hosp. v. Rowan County, 205 N.C. 8, 169 S.E. 805 (1933).

**Nor Is Provision as to Property Used as Residence.** — The third sentence of subsection (3) of this section is only permissive in terms and is not self-executing. The power of exemption, to the extent therein mentioned, is exercisable, in whole or in part, or not at all, as the General Assembly, in its wisdom, shall determine. Nash v. Board of Comm'rs, 211 N.C. 301, 190 S.E. 475 (1937).

**Power of Legislature to Grant Such Exemptions Is Limited.** — The power of the legislature to exempt from taxation property not owned by the State or its political subdivisions is limited and restricted by the scope of the constitutional grant of the permissive power of exemption. County of Rockingham v. Board of Trustees, 219 N.C. 342, 13 S.E.2d 618 (1941). See also, Trustees of Guilford College v. Guilford County, 219 N.C. 347, 13 S.E.2d 622 (1941).

The power to grant exemptions under authority of the second sentence in subsection (3) of this section, which may be exercised in whole, or in part, or not at all, as the General Assembly shall elect, is limited to property held for one or more of the purposes therein designated. County of Rockingham v. Board of Trustees, 219 N.C. 342, 13 S.E.2d 618 (1941). See also, Trustees of Guilford College v. Guilford County, 219 N.C. 347, 13 S.E.2d 622 (1941).

**Use to Which Property Is Devoted Controls.** — Under this section, it is the use to which the property is devoted and to the extent of the interest so dedicated which should control, rather than the title or other tenure by which it is held, and its provisions are broad and comprehensive enough to uphold the legislative exemption as to all property used exclusively for educational purposes. State ex rel. Corp. Comm'n v. Oxford Sem. Constr. Co., 160 N.C. 582, 76 S.E. 640 (1912).

The power granted to the legislature to exempt property from taxation is limited by the language of this section to property held for educational, scientific, charitable or religious purposes, the purpose for which the property is held and not the character of the corporation or association holding the property being the basis for the grant of permissive power to exempt; and thus, the legislature has no power to exempt property held by a religious or charitable corporation or organization for business or commercial purposes. Sir Walter Lodge, No. 411 v. Swain, 217 N.C. 632, 9 S.E.2d 365 (1940).

**Weight of Fact That Institution Has Not Been Paying Taxes.** — The fact that an educational incorporation had gone for a long period of time without paying taxes, unchallenged by both the legislative and executive department of the government, is deserving of great weight by the court in construing this section. State ex rel. Corp. Comm'n v. Oxford Sem. Constr. Co., 160 N.C. 582, 76 S.E. 640 (1912).

**No Distinction Between Public and Private Institutions.** — The provisions of this section make no distinction between public and private educational corporations, or between institutions which are in part conducted for the personal profit of the owner and those which are run on a salary basis, using any profits which may arise in the extension of the work. State ex rel. Corp. Comm'n v. Oxford Sem. Constr. Co., 160 N.C. 582, 76 S.E. 640 (1912).

**Church Lot.** — A lot purchased by the trustee of a church for the purpose of erecting a new church and Sunday school thereon, which pending the accumulation of sufficient funds to build the new church, was used exclusively for open air Sunday school and church meetings, was property held for religious purposes within the meaning of this section, and the legislature had the power to exempt such property from taxation. Harrison v. Guilford County, 218 N.C. 718, 12 S.E.2d 269 (1940).

**Property owned by a church and rented by it for commercial purposes,** and the rent used for religious purposes, is not exempt from taxation. Sparrow v. Beaufort County, 221 N.C. 222, 19 S.E.2d 861 (1942).

**Business property owned by an educational institution and rented** to private enterprises for offices and business purposes, the net profit derived therefrom being devoted exclusively to educational purposes, was not within the exemption granted by this section. County of Rockingham v. Board of Trustees, 219 N.C. 342, 13 S.E.2d 618 (1941). See also, Trustees of Guilford College v. Guilford County, 219 N.C. 347, 13 S.E.2d 622 (1941).

**Property of North Carolina Housing Finance Agency.** — Since Chapter 122A and the North Carolina Housing Finance Agency's activities pursuant thereto are for a public purpose, it is permissible for the General Assembly to exempt from taxation the property of the Agency and the obligations incurred by the Agency to effectuate such public purpose. Martin v. North Carolina Hous. Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

**Bonds.** — While the enumerated properties under this section do not expressly include bonds issued by the State or any State agency, whether revenue bonds or full faith and credit bonds, it is nevertheless generally considered that the legislature of a state has the power to exempt state and municipal bonds from taxation, since if such bonds are exempt from taxation the state or municipality will be able to issue them on more favorable terms and may then save more money than it would lose by being deprived of the right to tax them. A legislature may exempt such securities from taxation, even if the Constitution enumerates the subjects of exemption, and does not specifically name government securities, and even in the face of a constitutional declaration forbidding passage of laws exempting any property. State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970).

A legislative provision exempting the property and bonds of a city from taxation is valid when the bonds are to be issued for a public purpose, and certainly the bonds are exempt from taxation if sold to and held by an agency of the United States government, or are held by a purchaser from such federal agency. Any doubt as to the validity of this provision under this section must be resolved in favor of its validity. Webb v. Port Comm'n, 205 N.C. 663, 172 S.E. 377 (1934).

Bonds issued by a municipality to provide schoolhouses and equipment were for a public purpose, and since the bonds, although the property of a private corporation, were issued for a necessary public purpose and purchased in reliance upon the statutory provision exempting them from taxation, they would stand upon the same footing as the school buildings erected with the proceeds of the bonds. County of Mecklenburg v. Piedmont Fire Ins. Co., 210 N.C. 171, 185 S.E. 654 (1936).

The provisions of Session Laws 1967, c. 1177 (G.S. 116-209.1 et seq.) that exempt student loan revenue bonds from taxation by the State or by any of its subdivisions do not contravene this section. State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970).

Since the tax-exempt feature makes possible the more favorable sale of revenue bonds and thereby contributes substantially to the accomplishment of the public purpose for which they are issued, the General Assembly may exempt such bonds from taxation by the State or any of its subdivisions. Martin v. North Carolina Hous. Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

## OPINIONS OF ATTORNEY GENERAL

**Public Recreation Facilities.** — The expenditure of public funds for the construction and maintenance of public parks and recreational facilities was for a "public purpose" within the meaning of Art. V, § 3, Const. 1868, for which public monies might be spent, and the mere fact that such facilities were to be constructed on property which might revert to the grantor at some indefinite future time would not affect the purpose for which the expenditures were made. See Opinion of Attorney General to Mr. Francis M. Coiner, Hendersonville

City Attorney, 40 N.C.A.G. 494 (1969).

**Appropriation for a water project** which would provide a private industry with fire protection and a private water supplier and town with increased water service was for a public purpose in compliance with this section. See opinion of Attorney General to Mr. Steve B. Settlemeyer, City Attorney, 59 N.C.A.G. 12 (1989).

**Local School Administrative Unit Levying Taxes at Local Level.** — The legislature may by statute, consistently with the Constitution, provide that a local school administrative unit may levy taxes at the local level but such taxing authority must be conferred either by a general law, applicable statewide, or by local act subject to a vote of those persons affected. See opinion of Attorney General to Mr. John B. Dunn, Superintendent, Edenton-Chowan Schools, 60 N.C.A.G. 17 (1990).

**Town's Tax Rebate Program.** — It could reasonably be argued that a Business Development Investment Grant program's tax rebate scheme, designed to offer tax rebates for the purposes of "diversify[ing] the tax base, offer[ing] improved employment opportunities for citizens" and "promot[ing] economic growth," complied with the uniformity rule of this section. See opinion of Attorney General to Robert B. Smith, Jr., Smith and Gamblin, PLLC Attorneys at Law, 1997 N.C.A.G. 55 (8/29/97).

**Proposed conference center/hotel and golf course on Centennial Campus of North Carolina State University** would not necessarily fall outside a contemporary application of "public purpose" analysis, as set out in Maready v. City of Winston-Salem, 342 N.C. 708 (1996). See opinion of Attorney General to Representative Martin L. Nesbitt, North Carolina General Assembly, 2002 N.C.A.G. 33 (11/26/02).

**Town Located Within Two Counties.** — Session Laws 2001-439 and 2002-94 pertaining to the levy of an occupancy tax by cities in Avery County did not specifically authorize the levying of the tax throughout the entire town of Seven Devils, which is located within both Avery and Watagua counties. See opinion of Attorney General to Rebecca Eggers-Gryder, Eggers, Eggers, Eggers, and Eggers, 2003 N.C.A.G. 1 (1/23/03).

## Sec. 3. Limitations upon the increase of State debt.

(1) *Authorized purposes; two-thirds limitation.* The General Assembly shall have no power to contract debts secured by a pledge of the faith and credit of the State, unless approved by a majority of the qualified voters of the State who vote thereon, except for the following purposes:

(a) to fund or refund a valid existing debt;
(b) to supply an unforeseen deficiency in the revenue;
(c) to borrow in anticipation of the collection of taxes due and payable within the current fiscal year to an amount not exceeding 50 per cent of such taxes;
(d) to suppress riots or insurrections, or to repel invasions;
(e) to meet emergencies immediately threatening the public health or safety, as conclusively determined in writing by the Governor;
(f) for any other lawful purpose, to the extent of two-thirds of the amount by which the State's outstanding indebtedness shall have been reduced during the next preceding biennium.

(2) *Gift or loan of credit regulated.* The General Assembly shall have no power to give or lend the credit of the State in aid of any person, association, or corporation, except a corporation in which the State has a controlling interest, unless the subject is submitted to a direct vote of the people of the State, and is approved by a majority of the qualified voters who vote thereon.

(3) *Definitions.* A debt is incurred within the meaning of this Section when the State borrows money. A pledge of the faith and credit within the meaning of this Section is a pledge of the taxing power. A loan of credit within the meaning of this Section occurs when the State exchanges its obligations with or in any way guarantees the debts of an individual, association, or private corporation.

(4) *Certain debts barred.* The General Assembly shall never assume or pay any debt or obligation, express or implied, incurred in aid of insurrection or rebellion against the United States. Neither shall the General Assembly assume or pay any debt or bond incurred or issued by authority of the

Convention of 1868, the special session of the General Assembly of 1868, or the General Assembly of 1868-69 and 1869-70, unless the subject is submitted to the people of the State and is approved by a majority of all the qualified voters at a referendum held for that sole purpose.

(5) *Outstanding debt.* Except as provided in subsection (4), nothing in this Section shall be construed to invalidate or impair the obligation of any bond, note, or other evidence of indebtedness outstanding or authorized for issue as of July 1, 1973. (1969, c. 1200, s. 1.)

**Cross References.** — As to limitations upon the increase of local government debt, see N.C. Const., Art. V, § 4.

**History.** — The provisions of subsections (1) and (2) of this section are similar to those of Art. V, § 4, Const. 1868, as amended in 1924 and 1936, and the provisions of subsection (4) are similar to those of Art. I, § 6, Const. 1868, as amended in 1872-1873 and 1880.

**Legal Periodicals.** — For note on taxation and revenue bonds to finance low-income housing, see 49 N.C.L. Rev. 830 (1971).

For article on the need to reform North Carolina property tax law, see 59 N.C.L. Rev. 675 (1981).

For comment, "The States, Balanced Budgets, and Fundamental Shifts in Federalism," see 82 N.C.L. Rev. 1195 (2004).

## CASE NOTES

I. In General.
II. Contracting of Debt.
III. Gifts and Loans of Credit.
IV. Debts Barred by Subsection (4).

### I. IN GENERAL.

***Editor's Note.*** — *Most of the cases cited below were decided under this section as it stood before the revision of this Article by amendment adopted Nov. 3, 1970, effective July 1, 1973, and under corresponding provisions of the Constitution of 1868.*

**Application of G.S. 105-116 to Electric Cooperative Did Not Violate Rights.** — Section 105-116 taxes billings for electrical service rendered by cooperatives in the same manner as billings for service rendered by investor-owned utilities; therefore, application of the section to an electric cooperative did not violate that an entity's right under N.C. Const., Art. I, § 19, this section or N.C. Const., Art. V, § 2. Four County Elec. Membership Corp. v. Powers, 96 N.C. App. 417, 386 S.E.2d 107 (1989), cert. denied and appeal dismissed, 326 N.C. 799, 393 S.E.2d 894 (1990), cert. denied, 498 U.S. 1040, 111 S. Ct. 711, 112 L. Ed. 2d 700 (1991).

### II. CONTRACTING OF DEBT.

**Power to Contract Debts Limited.** — The language of this section is unambiguous; by its plain terms, the power of the State to contract debts in any biennium without submitting the matter to a vote of the people, except for those purposes specifically enumerated in the section, is definitely prescribed to two-thirds of the amount by which its outstanding indebtedness was decreased during the prior biennium. Hallyburton v. Board of Educ., 213 N.C. 9, 195 S.E. 21 (1938).

**The Constitution gives to the people the power to decide whether or not to contract a debt** by requiring their duly elected representatives to submit the question to them for their approval before the indebtedness is assumed. Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967); Cole v. City of Asheville, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

**Inapplicability to Turnpike Revenue Bonds.** — Since the Turnpike Authority's revenue bonds do not create a debt within the meaning of the Constitution, the limitations of this section are inapplicable. North Carolina Tpk. Auth. v. Pine Island, Inc., 265 N.C. 109, 143 S.E.2d 319 (1965).

**Power to Enter into Long-Term Contracts Not Restricted.** — The intent of the provision of this section which prohibits the General Assembly from contracting debt without voter approval is to restrict the State's power to borrow money, not its power to enter into long-term contracts. Boneno v. State, 54 N.C. App. 690, 284 S.E.2d 170 (1981).

**The method of financing set forth in G.S. 122A-6 does not create a debt** within the meaning of the Constitution and therefore the limitations of this section are inapplicable. Martin v. North Carolina Hous. Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

### III. GIFTS AND LOANS OF CREDIT.

**Subsection (2) Does Not Apply to State's School System.** — Subsection (2) of this section is an inhibition on giving or lending the credit of the State to third persons, individual or corporate, and of the kind contemplated in the provision; it cannot be construed to affect the mandatory provisions of N.C. Const., Art. IX, as to the maintenance of a statewide school system by legislative enactment. Lacy v. Fidelity Bank, 183 N.C. 373, 111 S.E. 612 (1922).

**Nor Does It Prohibit the Insuring of School Property.** — A county board of education has the authority to insure school property in a mutual fire insurance company authorized to do business in this State, and to assume the contingent liability limited to the amount of the cash premium, and the execution of such policy does not lend the credit of the State to a private corporation under this section. Fuller v. Lockhart, 209 N.C. 61, 182 S.E. 733 (1935).

**Authority to Establish Reserve or Contingency Fund Not Pledge of Faith and Credit.** — The fact that such appropriations as the General Assembly may see fit to make may be used for the establishment of a reserve or contingency fund to be available for the payment of the principal of and the interest on any bonds or notes of a public corporation does not constitute a pledge of the faith and credit of the State or of any political subdivision thereof for the payment of the principal of and the interest on any bonds or notes of the corporation. Martin v. North Carolina Hous. Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

**When Issuance of Bonds Does not Constitute Lending or Giving of State Credit.** — Where an act specifically provides that bonds or notes issued under it shall not be deemed to constitute a debt, liability or obligation of the State or of any political subdivision thereof, or a pledge of the faith and credit of the State or of any such political subdivision, but that they "shall be payable solely from the revenues and other funds provided therefor," the issuance of such bonds does not constitute a giving or lending of the credit of the State, or of its agency, within the meaning of this section. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

**Issuance of Bonds to Finance Hospital.** — Former G.S. 131-138 et seq., authorizing the Medical Care Commission (now Department of Human Resources) to issue revenue bonds to finance the construction of hospital facilities to be leased and ultimately conveyed to a public or private nonprofit agency, did not authorize the contracting of a debt by the State, or its agency, or the lending of the faith and credit of the State, or its agency, in violation of this section. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

**Issuance of Bonds to Aid War Veterans.** — A statute for the purpose of issuing bonds, passed by the legislature and approved by the vote of the people at an election duly had for the purpose, providing for an issuance and sale of State bonds for the purpose of lending the proceeds on mortgage to a certain amount of the value of the land to the veterans of the First World War to help them in providing homes for themselves, is the pledging of the credit of the State for a public purpose, and is a valid exercise of statutory authority. Hinton v. Lacy, 193 N.C. 496, 137 S.E. 669 (1927).

**Issuance of Bonds to Pay for Stock.** — A subscription for stock in a corporation and issuing bonds to pay for such stock is a gift of the credit of the State, within the meaning of this section. Galloway v. Jenkins, 63 N.C. 147 (1869).

**Lease of Facility by Ports Authority to Private Corporation.** — Lease of a facility by the Ports Authority to a private corporation, under the terms of which lease the corporation would pay during a five year term all costs of operation of the facility and rentals sufficient to retire in full revenue bonds issued by the Port Authority, did not constitute a loan of the credit of the State or the agency. North Carolina State Ports Auth. v. First-Citizens Bank & Trust Co., 242 N.C. 416, 88 S.E.2d 109 (1955).

**National Park Act.** — The statute establishing the North Carolina National Park Commission (Laws 1927, c. 48), with the certain powers therein enumerated, is for the benefit of the public of the State and not that of some third person, and does not fall within the provisions of this section. Yarborough v. North Carolina Park Comm'n, 196 N.C. 284, 145 S.E. 563 (1928).

**Vote of People Necessary to Aid New Railroad.** — The General Assembly has no power to contract a debt, without a vote of the people, to aid in the construction of, or build a new railroad. University R.R. v. Holden, 63 N.C. 410 (1869).

### IV. DEBTS BARRED BY SUBSECTION (4).

**Proceedings Dismissed.** — Proceedings to settle and adjudge the legal validity of claims against the State were dismissed in Baltzer v. State, 104 N.C. 265, 10 S.E. 153 (1889), for the reason that the General Assembly was expressly forbidden by constitutional provisions from which subsection (4) of this section was derived from paying the claim presented therein, the Supreme Court of North Carolina saying that "it would be idle, futile and ridiculous for this court to declare and adjudge the validity of a claim, against the State, and recommend to the General Assembly to provide for its payment, when the Constitution expressly forbids it to pay or provide for the payment of such a claim." Calkins Dredging Co. v. State, 191 N.C. 243, 131 S.E. 665 (1926).

## Sec. 4. Limitations upon the increase of local government debt.

(1) *Regulation of borrowing and debt.* The General Assembly shall enact general laws relating to the borrowing of money secured by a pledge of the faith and credit and the contracting of other debts by counties, cities and towns, special districts, and other units, authorities, and agencies of local government.

(2) *Authorized purposes; two-thirds limitation.* The General Assembly shall have no power to authorize any county, city or town, special district, or other unit of local government to contract debts secured by a pledge of its faith and credit unless approved by a majority of the qualified voters of the unit who vote thereon, except for the following purposes:

(a) to fund or refund a valid existing debt;
(b) to supply an unforeseen deficiency in the revenue;
(c) to borrow in anticipation of the collection of taxes due and payable within the current fiscal year to an amount not exceeding 50 per cent of such taxes;
(d) to suppress riots or insurrections;
(e) to meet emergencies immediately threatening the public health or safety, as conclusively determined in writing by the Governor;
(f) for purposes authorized by general laws uniformly applicable throughout the State, to the extent of two-thirds of the amount by which the unit's outstanding indebtedness shall have been reduced during the next preceding fiscal year.

(3) *Gift or loan of credit regulated.* No county, city or town, special district, or other unit of local government shall give or lend its credit in aid of any person, association, or corporation, except for public purposes as authorized by general law, and unless approved by a majority of the qualified voters of the unit who vote thereon.

(4) *Certain debts barred.* No county, city or town, or other unit of local government shall assume or pay any debt or the interest thereon contracted directly or indirectly in aid or support of rebellion or insurrection against the United States.

(5) *Definitions.* A debt is incurred within the meaning of this Section when a county, city or town, special district, or other unit, authority, or agency of local government borrows money. A pledge of faith and credit within the meaning of this Section is a pledge of the taxing power. A loan of credit within the meaning of this Section occurs when a county, city or town, special district, or other unit, authority, or agency of local government exchanges its obligations with or in any way guarantees the debts of an individual, association, or private corporation.

(6) *Outstanding debt.* Except as provided in subsection (4), nothing in this Section shall be construed to invalidate or impair the obligation of any bond, note, or other evidence of indebtedness outstanding or authorized for issue as of July 1, 1973. (1969, c. 1200, s. 1.)

**Cross References.** — As to limitations upon the increase of State debt, see N.C. Const., Art. V, § 3.

**History.** — The provisions of subsection (2) of this section are similar to those of Art. V, § 4, Const. 1868, as amended in 1924 and 1936. The provisions of subsection (3) are similar to those of Art. VII, § 6, Const. 1868, as amended in 1948 and 1962. The provisions of subsection (4) are similar to those of Art. VII, § 9, Const. 1868, as amended in 1936 and 1962.

**Legal Periodicals.** — For article on "Necessary Expenses," see 18 N.C.L. Rev. 93 (1940).

For note on "necessary expenses" of municipal corporations under this section, see 30 N.C.L. Rev. 313 (1952).

For note, "'Necessary Expense' Limitation — Four Recent Developments," see 43 N.C.L. Rev. 372 (1965).

For comment on Vance County v. Royster, 271

N.C. 53, 155 S.E.2d 790 (1967), cited in the note below, see 46 N.C.L. Rev. 188 (1967).

For note on taxation and revenue bonds to finance low-income housing, see 49 N.C.L. Rev. 830 (1971).

For comment, "The States, Balanced Budgets, and Fundamental Shifts in Federalism," see 82 N.C.L. Rev. 1195 (2004).

For comment, "'Don't Know What a Slide Rule Is For': The Need for a Precise Definition of Public Purpose in North Carolina in the Wake of Kelo v. City of New London," see 28 Campbell L. Rev. 291 (2006).

## CASE NOTES

I. Decisions under Current Section.
II. Decisions Prior to Amendment Effective July 1, 1973.

### I. DECISIONS UNDER CURRENT SECTION.

**The amendment effective July 1, 1973 is designed to narrow this section's restriction** on the local government's contracting powers. The previously effective language was held to require submission to the voters of a wide variety of contract obligations. United States v. 30.60 Acres of Land, 535 F. Supp. 33 (E.D.N.C. 1981).

**The amendment to this section effective July 1, 1973 specifically defined "debt"** to mean the borrowing of money by the local government, thereby excluding most general contractual obligations from the requirement of submission to the voters. United States v. 30.60 Acres of Land, 535 F. Supp. 33 (E.D.N.C. 1981).

**Sections 159-72 and 159-78,** which allow municipalities to issue general obligation refunding bonds in an amount greater than the bonds to be refunded, without a vote of the people, do not violate this section. City of Concord v. All Owners of Taxable Property, 330 N.C. 429, 410 S.E.2d 482 (1991).

**Refund of Valid Existing Debt.** — Subdivision (2)(a) of this section provides that voter approval is not required if a municipality's purpose for contracting a debt is to refund a valid existing debt; there is no requirement that the refunding indebtedness be less than or equal to the outstanding indebtedness. City of Concord v. All Owners of Taxable Property, 330 N.C. 429, 410 S.E.2d 482 (1991).

**Contract Granting Security Interest in Real Property Subject to Improvement.** — Section 160A-20, which authorizes a local government unit to enter into a contract granting a security interest in real property subject to improvement, does not contravene this section. Wayne County Citizens v. Wayne County Bd. of Comm'rs, 328 N.C. 24, 399 S.E.2d 311 (1991).

**Applied** in In re Denial of Approval to Issue Hous. Bonds, 307 N.C. 52, 296 S.E.2d 281 (1982).

### II. DECISIONS PRIOR TO AMENDMENT EFFECTIVE JULY 1, 1973.

***Editor's Note.*** *— The cases cited below were decided under this section as it stood before the revision of this Article by the amendment adopted Nov. 3, 1970, effective July 1, 1973, or under corresponding provisions of the Constitution of 1868.*

**Effect of Subsection (2).** — For case construing provisions from which subsection (2) of this section was derived as the dominant or controlling limitation upon the power of local units to contract debts or to issue bonds, see Coe v. Surry County, 226 N.C. 125, 36 S.E.2d 910 (1946).

The limitation prescribed by provisions from which subsection (2) of this section was derived was in addition to other constitutional limitations relating to taxation prescribed by this section and N.C. Const., Art. V, § 6; thus, a county may not borrow money, even for a necessary expense, without submitting the question to a vote, when its outstanding indebtedness has not been reduced during the prior fiscal year, and a taxpayer is entitled to injunctive relief restraining the issuance of the proposed bonds. Hallyburton v. Board of Educ., 213 N.C. 9, 195 S.E. 21 (1938).

The language of provision from which subsection (2) of this section was derived was unambiguous; by its plain terms the power of any county or municipality to contract debts in any fiscal year, without submitting the matter to a vote of the people, except for those purposes specifically enumerated in the amendment, is definitely prescribed to two-thirds of the amount by which its outstanding indebtedness was decreased during the prior fiscal year. Hallyburton v. Board of Educ., 213 N.C. 9, 195 S.E. 21 (1938).

**As to intent and effect of provisions from which subsection (3) of this section was derived,** see Brodnax v. Groom, 64 N.C. 244 (1870); Paine v. Caldwell, 65 N.C. 488 (1871); Chester & L.N.G.R.R. v. Commissioners of Caldwell County, 72 N.C. 486 (1875); Horton v. Redevelopment Comm'n, 259 N.C. 605, 131 S.E.2d 464 (1963).

**Necessary Expenses.** — For cases construing and applying the former "necessary expense" limitation found in subsection (2) (now subsection (3)) of this section prior to its amendment effective July 1, 1973, and in corresponding provisions of the Constitution of 1868, see Wilson v. Board of Aldermen, 74 N.C. 748 (1876); Tucker v. City of Raleigh, 75 N.C. 267 (1876); Halcomb v. Commissioners of Haywood, 89 N.C. 346 (1883); Lynchburg & D.R.R. v. Board of Comm'rs, 109 N.C. 159, 13 S.E. 783 (1891); Herring v. Dixon, 122 N.C. 420, 29 S.E. 368 (1898); Garsed v. City of Greensboro, 126 N.C. 159, 35 S.E. 254 (1900); Brockenbrough v. Board of Water Comm'rs, 134 N.C. 1, 46 S.E. 28 (1903); Fawcett v. Town of Mt. Airy, 134 N.C. 125, 45 S.E. 1029 (1903); Greensboro v. Scott, 138 N.C. 181, 50 S.E. 589 (1905); Town of Hendersonville v. Jordan, 150 N.C. 35, 63 S.E. 167 (1908); Hightower v. City of Raleigh, 150 N.C. 569, 65 S.E. 279 (1909); Jones v. City of New Bern, 152 N.C. 64, 67 S.E. 173 (1910); Ellison v. Town of Williamston, 152 N.C. 147, 67 S.E. 255 (1910); Underwood v. Town of Asheboro, 152 N.C. 641, 68 S.E. 147 (1910); City of Kinston v. Security Trust Co., 169 N.C. 207, 85 S.E. 399 (1915); Keith v. Lockhart, 171 N.C. 451, 88 S.E. 640 (1916); Swindell v. Town of Belhaven, 173 N.C. 1, 91 S.E. 369 (1917); Woodall v. Western Wake Hwy. Comm'n, 176 N.C. 377, 97 S.E. 226 (1918); Davis v. Lenoir County, 178 N.C. 668, 101 S.E. 260 (1919); Emery v. Commissioners of Mecklenburg County, 181 N.C. 420, 107 S.E. 443 (1921); Brown v. Town of Hillsboro, 185 N.C. 368, 117 S.E. 41 (1923); Norfolk S.R.R. v. Reid, 187 N.C. 320, 121 S.E. 534 (1924); Reed v. Howerton Eng'g Co., 188 N.C. 39, 123 S.E. 479 (1924); Lassiter v. Board of Comm'rs, 188 N.C. 379, 124 S.E. 738 (1924); Storm v. Town of Wrightsville Beach, 189 N.C. 679, 128 S.E. 17 (1925); Hill v. Board of Comm'rs, 190 N.C. 123, 129 S.E. 154 (1925); Henderson v. City of Wilmington, 191 N.C. 269, 132 S.E. 25 (1926); Moore v. City of Greensboro, 191 N.C. 592, 132 S.E. 565 (1926); Ellis v. Greene, 191 N.C. 761, 133 S.E. 395 (1926); Board of Comm'rs v. Assell, Goetz & Moerlien, Inc., 194 N.C. 412, 140 S.E. 34 (1927), petition for rehearing dismissed, 195 N.C. 719, 143 S.E. 474 (1928); Drysdale v. Prudden, 195 N.C. 722, 143 S.E. 530 (1928); Barbour v. County of Wake, 197 N.C. 314, 148 S.E. 470 (1929); Burleson v. Board of Aldermen, 200 N.C. 30, 156 S.E. 241 (1930); Walker v. Town of Faison, 202 N.C. 694, 163 S.E. 875 (1932); Starmount Co. v. Ohio Sav. Bank & Trust Co., 55 F.2d 649 (4th Cir. 1932); Starmount Co. v. Town of Hamilton Lakes, 205 N.C. 514, 171 S.E. 909 (1933); Lamb v. City of Randleman, 206 N.C. 837, 175 S.E. 293 (1934); Wilson v. City of Charlotte, 206 N.C. 856, 175 S.E. 306 (1934); Martin v. Board of Comm'rs, 208 N.C. 354, 180 S.E. 777 (1935); Martin v. City of Raleigh, 208 N.C. 369, 180 S.E. 786 (1935); Board of Fin. Control v. County of Henderson, 208 N.C. 569, 181 S.E. 636, 101 A.L.R. 783 (1935), overruled on other grounds, In re Univ. of N.C., 300 N.C. 563, 268 S.E.2d 472 (1980); Newman v. Watkins, 208 N.C. 675, 182 S.E. 453 (1935); Burt v. Town of Biscoe, 209 N.C. 70, 183 S.E. 1 (1935); Thomson v. Harnett County, 209 N.C. 662, 184 S.E. 490 (1936); Atkins v. City of Durham, 210 N.C. 295, 186 S.E. 330 (1936); Morrow v. Durham, 210 N.C. 564, 187 S.E. 752 (1936); Goswick v. City of Durham, 211 N.C. 687, 191 S.E. 728 (1937), citing Hargrave v. Board of Comm'rs, 168 N.C. 626, 84 S.E. 1044 (1915); Palmer v. County of Haywood, 212 N.C. 284, 193 S.E. 668, 113 A.L.R. 1195 (1937); Williamson v. City of High Point, 213 N.C. 96, 195 S.E. 90 (1938); Nantahala Power & Light Co. v. County of Clay, 213 N.C. 698, 197 S.E. 603 (1938); Nash v. Town of Tarboro, 227 N.C. 283, 42 S.E.2d 209 (1947); Green v. Kitchin, 229 N.C. 450, 50 S.E.2d 545 (1948), discussed in 27 N.C.L. Rev. 500; Board of Managers v. City of Wilmington, 237 N.C. 179, 74 S.E.2d 749 (1953); Wilson v. City of High Point, 238 N.C. 14, 76 S.E.2d 546 (1953); City of Greensboro v. Smith, 241 N.C. 363, 85 S.E.2d 292 (1955); DeLoatch v. Beamon, 252 N.C. 754, 114 S.E.2d 711 (1960); Dennis v. City of Raleigh, 253 N.C. 400, 116 S.E.2d 923 (1960); Horton v. Redevelopment Comm'n, 259 N.C. 605, 131 S.E.2d 464 (1963); Horton v. Redevelopment Comm'n, 262 N.C. 306, 137 S.E.2d 115 (1964); Keeter v. Town of Lake Lure, 264 N.C. 252, 141 S.E.2d 634 (1965); Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967); Harrelson v. City of Fayetteville, 271 N.C. 87, 155 S.E.2d 749 (1967); Cole v. City of Asheville, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

**Schools.** — For cases dealing with the operation and maintenance of schools under this section prior to its amendment effective July 1, 1973, and under corresponding provisions of the Constitution of 1868, see Smith v. School Trustees, 141 N.C. 143, 53 S.E. 524 (1906); Hollowell v. Borden, 148 N.C. 255, 61 S.E. 638 (1908); Lacy v. Fidelity Bank, 183 N.C. 373, 111 S.E. 612 (1922); Lovelace v. Pratt, 187 N.C. 686, 122 S.E. 661 (1924); Tate v. Board of Educ., 192 N.C. 516, 135 S.E. 336 (1926); Frazier v. Board of Comm'rs, 194 N.C. 49, 138 S.E. 433 (1927); Hartsfield v. Craven County, 194 N.C. 358, 139 S.E. 698 (1927); Hall v. Commissioners of Duplin County, 194 N.C. 768, 140 S.E. 739 (1927); Owens v. Wake County, 195 N.C. 132, 141 S.E. 546 (1928); Hall v. Commissioners of Duplin, 195 N.C. 367, 142 S.E. 315 (1928); Hammond v. City of Charlotte, 206 N.C. 604, 175 S.E. 148 (1934); Fuller v. Lockhart, 209 N.C. 61, 182 S.E. 733 (1935); City of Greensboro v. Guilford County, 209 N.C. 655, 184 S.E. 473 (1936); Boney v. Board of Trustees, 229 N.C. 136, 48 S.E.2d 56 (1948); Harris v. Board of Comm'rs, 1 N.C. App. 258, 161 S.E.2d 213, aff'd, 274 N.C. 343, 163 S.E.2d 387 (1968); Benvenue Parent-Teacher Ass'n v. Nash County Bd. of Educ., 4 N.C. App. 617, 167 S.E.2d 538, appeal dismissed, 275 N.C. 675, 170 S.E.2d 473

(1969); Yoder v. Board of Comm'rs, 7 N.C. App. 712, 173 S.E.2d 529 (1970).

**As to application of what is now subsection (4)** of this section, see Leak v. Commissioners of Richmond County, 64 N.C. 133 (1870); Poindexter v. Davis, 67 N.C. 112 (1872); Weith v. City of Wilmington, 68 N.C. 24 (1873); Logan v. Plummer, 70 N.C. 388 (1874); Davis v. Board of Comm'rs, 72 N.C. 441 (1875); Brickell v. Commissioners of Halifax, 81 N.C. 240 (1879); Wingate v. Parker, 136 N.C. 369, 48 S.E. 774 (1904); Jones v. Commissioners, 137 N.C. 579, 50 S.E. 291 (1905); Smith v. School Trustees, 141 N.C. 143, 53 S.E. 524 (1906); Southern Ry. v. Board of Comm'rs, 148 N.C. 220, 61 S.E. 690 (1908); Board of Trustees v. Webb, 155 N.C. 379, 71 S.E. 520 (1911).

**The Constitution gives the people the power to decide whether or not to contract a debt** by requiring their duly elected representatives to submit the question to them for their approval before the indebtedness is assumed. Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967); Cole v. City of Asheville, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

The constitutional provision imposing a limitation upon the power of the State, counties and municipalities to contract debts without a vote of the people does not deprive the county of any power to contract a debt. It merely declares who shall have the power of decision. Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967); Cole v. City of Asheville, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

The Constitution proceeds upon the theory that if it is, indeed, wise to contract an indebtedness for an unnecessary county or city expense, the people of the county or city will recognize this when the facts are presented to them and will approve the assumption of the obligation; and if they do not approve it, it ought not to be undertaken at their expense even though the county or city commissioners, and the courts as well, deem it wise to do so. Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967); Cole v. City of Asheville, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

**The term "municipal corporation" should not be construed narrowly** to include only cities, towns, counties and school districts, as the Constitution contemplates a broader construction of the term. In its broader sense, the term includes all public corporations exercising governmental functions within the constitutional limitations. Wells v. Housing Auth., 213 N.C. 744, 197 S.E. 693 (1938); Carolina-Virginia Coastal Hwy. v. Coastal Tpk. Auth., 237 N.C. 52, 74 S.E.2d 310 (1953).

**The State is not a municipality** within the meaning of the Constitution. It may perform the duties required of it by the Constitution, as well as exercise those powers not otherwise prohibited, without embarrassment by constitutional limitations expressly operating on municipalities alone. Harris v. Board of Comm'rs, 1 N.C. App. 258, 161 S.E.2d 213, aff'd, 274 N.C. 343, 163 S.E.2d 387 (1968).

**Debt.** — As to meaning of "debt" under provisions from which subsections (2) and (3) of this section were derived, see Williamson v. City of High Point, 213 N.C. 96, 195 S.E. 90 (1938). See also, McGuinn v. City of High Point, 219 N.C. 56, 13 S.E.2d 48 (1941).

**When Bonds Are Not a "Debt".** — Bonds of a city, issued for the purpose of acquiring revenue-producing property and which expressly provide that only the revenues produced by such property shall be used for or subject to demand for payment of such bonds, are not a "debt" of the city. Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967).

**Year Debt Contracted.** — A debt is contracted during the fiscal year following that in which the debt was reduced, even though the certificate of the secretary of the local government commission required by G.S. 159-18 was not executed within that time. Board of Educ. v. State Bd. of Educ., 217 N.C. 90, 6 S.E.2d 833 (1940).

**In determining the amount of debt contracted in any fiscal year** within the provision of subsection (2) of this section, limiting the power of a taxing unit to contract debts to two-thirds the amount by which the taxing unit's outstanding debt was decreased during the prior fiscal year, the total amount of bonds issued during the fiscal year, by the taxing unit, whether with or without the approval of its voters, should be included, except bonds issued by it to fund or refund a valid existing debt, to supply a casual deficit, to suppress riots or insurrections, or to repel invasions, and except tax anticipation notes issued in an amount not exceeding 50% of the taxes for the fiscal year. Hallyburton v. Board of Educ., 213 N.C. 9, 195 S.E. 21 (1938).

**Bonds in excess of two-thirds of amount by which taxing unit decreased its outstanding debt during prior fiscal year** may be issued upon approval of a majority of those voting under subsection (2) of this section. Twining v. City of Wilmington, 214 N.C. 655, 200 S.E. 416 (1939).

When a proposed bond issue is in excess of two-thirds of the amount by which the issuing county reduced its outstanding indebtedness during the prior fiscal year, the question must be submitted to a vote and the issuance must be approved by a majority of the voters who shall vote thereon, regardless of the purpose of the bonds, unless the purpose is within the specific exceptions enumerated in subsection (2) of this section. Sessions v. Columbus County, 214 N.C. 634, 200 S.E. 418 (1939).

**Bonds are outstanding within the meaning of subsection (2) of this section until**

**actually paid and canceled** or delivered to the county for cancellation. Coe v. Surry County, 226 N.C. 125, 36 S.E.2d 910 (1946).

Where county bonds were payable at a certain banking institution on the first day of a county fiscal year, and before the close of the next preceding fiscal year the county made available funds for payment thereof, the bonds were outstanding at the close of the latter year within the meaning of subsection (2) of this section. Coe v. Surry County, 226 N.C. 125, 36 S.E.2d 910 (1946).

**Refunding Bonds.** — A municipal corporation does not contract a "debt" when under statutory authority it issues bonds to refund bonds which at the date of the issuance of the refunding bonds are valid and enforceable obligations of the corporation. Bolich v. City of Winston-Salem, 202 N.C. 786, 164 S.E. 361 (1932).

Where a proposed county bond issue was to refund a valid existing debt of the county within the meaning of subsection (2) of this section, under the exception therein provided a vote was unnecessary, nor could the means for the repayment of the bonds be adversely affected by any constitutional change. Thompson v. Harnett County, 212 N.C. 214, 193 S.E. 158 (1937).

Where, during the prior fiscal year, defendant county began refunding operations, and during that year issued its refunding bonds, but did not retire the bonds refunded until the first day of the present fiscal year, and where plaintiff contended that since both the refunding bonds and the bonds refunded were outstanding during the prior fiscal year, that there had been an increase rather than a decrease in the county's outstanding indebtedness during the prior fiscal year, it was held that the failure of the county to complete its refunding operations during the prior fiscal year was immaterial, and that the refunding bonds should not be included in determining the amount by which the county had reduced its outstanding indebtedness during the prior fiscal year within the meaning of the constitutional limitation on an increase of debt by counties and municipalities. Royal v. Sampson County, 214 N.C. 259, 199 S.E. 15 (1938).

**Bonds for Streets and Sewage.** — A municipality may not issue bonds for street and sewage construction or extension without a vote when, during the fiscal year, such city has issued bonds with the approval of the voters in excess of the amount by which it had reduced its outstanding indebtedness during the prior fiscal year, the purpose of subsection (2) of this section being to limit the existing power of the governing authorities to issue bonds for necessary expenses so that the net indebtedness of the taxing unit should not be increased beyond the limits prescribed in the amendment, except with the approval of its voters. Gill v. City of Charlotte, 213 N.C. 160, 195 S.E. 368 (1938).

**Bonds for Municipal Power Plant.** — A contract of a municipality to construct a municipal electric power plant and to issue its bonds to pay for same, with provision that principal and interest of the bonds should be paid exclusively from the profits from the plant without resort to funds raised by taxation, does not create a "debt" of the municipality within the meaning of subsection (2) of this section, which prohibits the contracting of a debt by a municipality in any fiscal year in excess of two-thirds of the amount by which its debt was decreased during the prior fiscal year. Williamson v. City of High Point, 213 N.C. 96, 195 S.E. 90 (1938). See also, McGuinn v. City of High Point, 219 N.C. 56, 13 S.E.2d 48 (1941).

**In an election for the issuance of county bonds for a new school building,** a necessary expense, a favorable vote of the majority of those voting is sufficient to validate the bond resolution and authorize the issuance and sale of the proposed bonds. Mason v. Moore County Bd., of Comm'rs, 229 N.C. 626, 51 S.E.2d 6 (1948).

**Local bond issue** of town of Lake Lure held not to violate this section. Keeter v. Town of Lake Lure, 264 N.C. 252, 141 S.E.2d 634 (1965).

**Authority to Issue Bonds Implies Authority to Levy Taxes for Payment of Bonds.** — The exercise by a municipal corporation of the power to pledge its credit is an incipient step in the exercise of the power of taxation, and authority given to a municipality to issue bonds necessarily involves the power to levy taxes for the payment of interest on said bonds and the payment of said bonds at maturity. Wilson v. City of High Point, 238 N.C. 14, 76 S.E.2d 546 (1953).

**This section contemplates a contracting of an obligation to be paid at some future time.** Davis v. Iredell County, 9 N.C. App. 381, 176 S.E.2d 361 (1970).

**It does not apply where the funds to be applied are already on hand** and the proposed expenditure will impose no further liability on the municipality, nor involve the imposition of further taxation upon it. Davis v. Iredell County, 9 N.C. App. 381, 176 S.E.2d 361 (1970).

Provision from which subsection (3) of this section was derived from had no application where the funds to be applied were already on hand and the proposed expenditure would impose no further liability on the municipality. Adams v. City of Durham, 189 N.C. 232, 126 S.E. 611 (1925).

**The acquisition of land from surplus funds is not beyond the power of a city** and it in no way offends the provisions of this section. Davis v. Iredell County, 9 N.C. App. 381, 176 S.E.2d 361 (1970).

The acquisition of the land for a municipal airport from surplus funds was not beyond the power of the city and it in no way offended this section. Goswick v. City of Durham, 211 N.C. 687, 191 S.E. 728 (1937).

**Where appropriations were made by two cities and county to airport authority out of funds not derived from ad volorem taxes,** and the funds were free from other specified purpose or legal commitment, no question of credit in violation of this section was involved. Greensboro-High Point Airport Auth. v. Johnson, 226 N.C. 1, 36 S.E.2d 803 (1946).

**Agreement to Contribute Nontax Revenue for Airport.** — Even though an agreement between a city and a county and the federal government might be construed to obligate the city and county to spend only nontax revenue for the maintenance and operation of an airport, county and city were without authority to incur such debt without the approval of the voters. Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967).

A contract between a county and one of its municipalities to contribute funds for the construction and operation of an airport, without submitting the question to a vote, was invalid, even if the contribution of funds for the construction of the airport was made from nontax revenue, where the contract was indivisible and the pledging of future operating funds was unlimited, and, even if limited to nontax revenue, would be unconstitutional. Yokley v. Clark, 262 N.C. 218, 136 S.E.2d 564 (1964).

**Where a city sells land used for recreation purposes** and turns the proceeds of the sale over to its park and recreation commission, the action is not a pledging of its faith and credit. Hall v. Redd, 196 N.C. 622, 146 S.E. 583 (1929).

**Vote on Distinct Debts in One Ballot Box.** — An issue of municipal bonds, when approved by the voters, under the authority of a statute passed according to the constitutional requirements, is not invalid because there were several distinct debts provided and voted for in one ballot box. Smith v. Town of Belhaven, 150 N.C. 156, 63 S.E. 610 (1909).

**Only a single proposition may be placed on the ballot** for submission to the voters in a bond election, since the submission of dual propositions would defeat the right of the voters to express their choice. Jamison v. City of Charlotte, 239 N.C. 682, 80 S.E.2d 904 (1954).

**Submission of Question of Issuance of County Bonds and City Bonds.** — In a bond election in a county and a city situate therein, the submission to the voters of the question of the issuance of county bonds in a stipulated sum and city bonds in a stipulated sum for the purpose of providing funds for erecting and equipping public libraries for the city and for the county, and the imposition of a tax within the city for the payment of the city bonds and a tax in the entire county, including the city, for the payment of the county, as a single question, is the submission of but a single proposition so related and united as to form a rounded whole and does not violate this section. Jamison v. City of Charlotte, 239 N.C. 682, 80 S.E.2d 904 (1954).

**Endorsement of Township Bonds by County.** — Where townships are permitted to call an election for the purpose of voting upon the issuance of township bonds for the roads of the township, the proceeds to be turned over to the sole management and control of the township commissioners, with further provision that the county endorse the bonds upon being satisfied of the validity of the issuance, the endorsement by the county of the township bonds is a loan of the credit of the county, without benefit to the other townships, and contrary to this section. Commissioners of Bladen County v. Boring, 175 N.C. 105, 95 S.E. 43 (1918).

**Act Not Limiting Amount of Bonds.** — An exception to the constitutionality of an act submitting the question of a bond issue to the voters cannot be sustained on the ground that it does not limit the amount of the bonds that may be issued for the purposes therein authorized. Waters v. Board of Comm'rs, 186 N.C. 719, 120 S.E. 450 (1923).

**Function Assumed by Municipality Must Be Public.** — A municipal corporation cannot, even with express legislative sanction, embark on any private enterprise or assume any function which is not in a legal sense public. Brown v. Board of Comm'rs, 223 N.C. 744, 28 S.E.2d 104 (1943).

A municipal corporation cannot, even with express legislative sanction, engage in any private enterprise or assume any function which is not in a legal sense public in nature, the word "private" as used in opinions discussing the powers of a municipality being used to designate proprietary, as distinguished from governmental, functions. Keeter v. Town of Lake Lure, 264 N.C. 252, 141 S.E.2d 634 (1965).

**Expansion of City's Power Lines with Surplus Profits.** — Where an incorporated city under authority of statute furnishes through its own transmission lines electricity for its citizens for hire within a circumscribed territory adjoining its limits, and the expenses incident thereto are paid out of its surplus profits, the proposition is not one that requires the approval of the voters. Holmes v. City of Fayetteville, 197 N.C. 740, 150 S.E. 624 (1929), appeal dismissed, 281 U.S. 700, 50 S. Ct. 353, 74 L. Ed. 1126 (1930).

**No Right Vested by Former Construction.** — A public service corporation, which was granted a franchise and entered into a contract with a city when, under Art. VII, § 6, Const. 1868, as then construed, the city was without power to construct competing works, but which constitutional provision was subsequently construed to grant such power, had no standing, after its franchise and contract had expired by limitation, to invoke the rule that one acquiring rights under one construction of a state law may not be deprived of them by a subsequent different construction. Hill v. Elizabeth City, 298 F. 67 (4th Cir. 1924).

**Provisions of former G.S. 131-138 et seq.,** authorizing local governmental units to enter into lease agreements with the Medical Care Commission (now Department of Human Resources) and making obligations of any such governmental unit under a lease agreement payable not only from revenues derived from the leased facility but also from revenues derived from other hospital facilities owned by the lessee and related to the leased facility, were unconstitutional in that they authorized local government units to contract a debt without a vote of the people in excess of the amount specified in this section. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

## Sec. 5. Acts levying taxes to state objects.

Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose. (1969, c. 1200, s. 1.)

**History.** — This section is identical to Article V, § 8 of the Constitution of 1868. In 1873, Article V of the Constitution was amended and section 8 became section 7.

**Legal Periodicals.** — For note on taxation and revenue bonds to finance low-income housing, see 49 N.C.L. Rev. 830 (1971).

For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1116 (1981).

For note on the rejection of the "public purpose" requirement for state tax exemption, see 17 Wake Forest L. Rev. 293 (1981).

### CASE NOTES

**Statute Authorizing County to Impose Tax.** — Where a statute authorizes a county to impose a tax for necessary expenses, it is a delegation of the power to be exercised by the county as an agency for the State for the convenience of local administration, and the statute is not void in failing to state the special object to which it is to be applied, nor is the tax itself invalid if this constitutional requirement has been observed by the county authority in the imposition of the special tax. Norfolk S.R.R. v. Reid, 187 N.C. 320, 121 S.E. 534 (1924), decided under former Art. V, § 7, Const. 1868, as amended in 1873.

Governor's order directing the revenue secretary to halt expenditures for capital improvements, further reduce expenditures throughout state agencies, and withhold funds appropriated to local governments was authorized by N.C. Const. art. III, § 5(3) to prevent a deficit, and did not violate the separation of powers doctrine; further N.C. Const. art. V, § 5, which was directed at the general assembly, did not conflict with N.C. Const. art. III, § 5. County of Cabarrus v. Tolson, 169 N.C. App. 636, 610 S.E.2d 443, 2005 N.C. App. LEXIS 615 (2005).

**Section Does Not Apply to Levy by Counties, Cities or Towns for General Purposes.** — The provisions of this section do not extend to taxes levied by counties or incorporated cities or towns for general municipal purposes. Cabe v. Board of Aldermen, 185 N.C. 158, 116 S.E. 419 (1923), decided under former Art. V, § 7, Const. 1868, as amended in 1873.

This section has no application to taxes levied by the county authorities for county purposes. Parker v. Board of Comm'rs, 104 N.C. 166, 10 S.E. 137 (1889), decided under former Art. V, § 7, Const. 1868 as amended in 1873.

**Subsequent Act Changing Purpose of Levy First Authorized to Pay County Bonds.** — Where an act authorized the levy and collection of a special tax for the payment of certain county bonds, and a later act directed that the special tax collected under the first act should be turned into the general county fund, the first act was in conflict with this section, which provides that every act of the General Assembly levying a tax shall state the special object to which it is to be applied. McCless v. Meekins, 117 N.C. 34, 23 S.E. 99 (1895), decided under former Art. V, § 7, Const. 1868, as amended in 1873.

**A law authorizing a bond issue for various purposes** which does not declare what proportion of the proceeds of the bonds shall be applied to each specific purpose is not void. Such matter may properly rest within the sound discretion of the municipal authorities. Coggins v. City of Asheville, 278 N.C. 428, 180 S.E.2d 149 (1971).

**Discretion of Municipal Corporation in**

**Use of Bond Money.** — With respect to the use of bond money, the court will not interfere with the exercise of discretionary powers of a municipal corporation unless its actions are so unreasonable and arbitrary as to amount to an abuse of discretion. Coggins v. City of Asheville, 278 N.C. 428, 180 S.E.2d 149 (1971).

**Transfer of Funds from Bond Issue from One Project to Another.** — While a municipality has a limited authority, under certain conditions, to transfer or allocate funds from one project to another included within the general purpose for which bonds are authorized, the transfer must be to a project included in the general purpose as stated in the bond resolution, and the funds may be diverted to the proposed purposes only in the event that the municipality finds in good faith that conditions have so changed since the bonds were authorized that proceeds therefrom are no longer needed for the original purpose. Coggins v. City of Asheville, 278 N.C. 428, 180 S.E.2d 149 (1971).

**Immaterial or Temporary Changes in Use of Bond Proceeds.** — While the law will not justify the use of the proceeds of a State or municipal bond issue for purposes other than those specified in the act authorizing the issue, it does not follow that immaterial or temporary changes consistent with the general purpose of the legislative act should be interpreted as unlawful diversions of public funds. Coggins v. City of Asheville, 278 N.C. 428, 180 S.E.2d 149 (1971).

**As to Changes Necessary to Accomplish General Purpose of bond money,** see Coggins v. City of Asheville, 278 N.C. 428, 180 S.E.2d 149 (1971).

**Elective Abortions.** — State funding of elective abortions does not violate this section of the Constitution. Stam v. State, 302 N.C. 357, 275 S.E.2d 439 (1981).

**Section 113-156.1 does not violate this section,** which provides that every act of the General Assembly levying a tax shall state the special object to which it is to be applied and that it shall be applied to no other purpose, as it is part of Subchapter IV of Chapter 113, the special purpose of which is the conservation of marine and estuarine and wildlife resources, and it is evident that the license tax is levied and applied for this purpose. State v. Rippy, 80 N.C. App. 232, 341 S.E.2d 98 (1986).

**Applied** in In re Denial of Approval to Issue Hous. Bonds, 307 N.C. 52, 296 S.E.2d 281 (1982).

**Cited** in In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979).

## Sec. 6. Inviolability of sinking funds and retirement funds.

(1) *Sinking funds.* The General Assembly shall not use or authorize to be used any part of the amount of any sinking fund for any purpose other than the retirement of the bonds for which the sinking fund has been created, except that these funds may be invested as authorized by law.

(2) *Retirement funds.* Neither the General Assembly nor any public officer, employee, or agency shall use or authorize to be used any part of the funds of the Teachers' and State Employees' Retirement System or the Local Governmental Employees' Retirement System for any purpose other than retirement system benefits and purposes, administrative expenses, and refunds; except that retirement system funds may be invested as authorized by law, subject to the investment limitation that the funds of the Teachers' and State Employees' Retirement System and the Local Governmental Employees' Retirement System shall not be applied, diverted, loaned to, or used by the State, any State agency, State officer, public officer, or public employee. (1969, c. 1200, s. 1.)

**History.** — The provisions of subsection (1) of this section are similar to those of Art. II, § 30, Const. 1868, as adopted in 1924, and the provisions of subsection (2) are similar to those of Art. II, § 31, Const. 1868, as adopted in 1950.

**Legal Periodicals.** — For note on taxation and revenue bonds to finance low-income housing, see 49 N.C.L. Rev. 830 (1971).

### CASE NOTES

**Definition of Divert.** — Applying the plain meaning of the term divert contained in N.C. Const., Art. V, § 6(2), the prohibition against seizure of funds applied to and included funds appropriated and intended for the retirement system, but not yet deposited therein. State officials, by the terms of Executive Order No. 3, diverted assets of the retirement system and violated the constitutional provision. Stone v. State, 191 N.C. App. 402, 664 S.E.2d 32, 2008 N.C. App. LEXIS 1485 (2008).

**Construction with Art. 3, § 5.** — N.C. Const., Art. V, § 6(2) provides that sinking funds and retirement funds are inviolable; however, N.C. Const., Art. III, § 5 details the duties of the Governor, requiring that he balance the budget, and State Employees Association of North Carolina, Inc. lacked standing to contest an executive order providing for the reallocation of retirement funds. State Employees Ass'n of N.C., Inc. v. State, 154 N.C. App. 207, 573 S.E.2d 525, 2002 N.C. App. LEXIS 1451 (2002).

**Actuarially Unsound Diversion of Funds.** — Actuarially unsound diversion of funds threatened the integrity and security of a state employees' Retirement System. By diverting the funds, the state officials' actions impaired the contractual right of state employees to a retirement system funded in an actuarially sound manner and violated the employees' rights under the contract clause. Stone v. State, 191 N.C. App. 402, 664 S.E.2d 32, 2008 N.C. App. LEXIS 1485 (2008).

**Sum Erroneously Placed in Sinking Fund.** — While sinking funds provided for the retirement of municipal bonds may not be diverted from that purpose to other municipal requirements by a city, a sum erroneously placed on the books of the city in a sinking fund by a clerk without authorization, which sum was actually derived from profits from the municipal electric plant, does not fall within the constitutional or statutory inhibitions, and the city may by ordinance correct the error of the clerk and use the funds for other lawful municipal purposes. Mewborn v. City of Kinston, 199 N.C. 72, 154 S.E. 76 (1930), decided under former Art. II, § 30, Const. 1868.

**Expenditure of Surplus Unencumbered Funds.** — Although the General Assembly cannot authorize a diversion of a county's sinking funds which are necessary to pay outstanding sinking fund bonds, it can direct the expenditure of surplus unencumbered sinking funds, provided the expenditure is for a public purpose. Johnson v. Marrow, 228 N.C. 58, 44 S.E.2d 468 (1947), decided under former Art. II, § 30, Const. 1868.

**Public Policy Favors Inviolability of Retirement Funds.** — Retirement funds specifically receive special constitutional protection in North Carolina; N.C. Const., Art. V, § 6(2) plainly provides that the State may not use retirement funds for any purpose other than retirement system benefits and purposes, administrative expenses, and refunds. This constitutional provision demonstrates the strong public policy of North Carolina in favor of the inviolability of retirement funds. Stone v. State, 191 N.C. App. 402, 664 S.E.2d 32, 2008 N.C. App. LEXIS 1485 (2008).

## Sec. 7. Drawing public money.

(1) *State treasury.* No money shall be drawn from the State treasury but in consequence of appropriations made by law, and an accurate account of the receipts and expenditures of State funds shall be published annually.

(2) *Local treasury.* No money shall be drawn from the treasury of any county, city or town, or other unit of local government except by authority of law. (1969, c. 1200, s. 1.)

**History.** — The provisions of subsection (1) of this section are similar to those of Art. XIV, § 3, Const. 1868. The provisions of subsection (2) are similar to those of Art. VII, § 7, Const. 1868, as amended in 1962.

### CASE NOTES

***Editor's Note.*** — *Most of the cases cited below were decided under former Art. XIV, § 3, Const. 1868.*

**Legislative Authority Required.** — Subsection (1) of this section means that there must be legislative authority in order for money to be validly drawn from the treasury. In other words, the legislative power is supreme over the public purse. White v. Hill, 125 N.C. 194, 34 S.E. 432 (1899), citing Garner v. Worth, 122 N.C. 250, 29 S.E. 364 (1898).

Moneys paid into the hands of the State Treasurer by virtue of a State law become public funds for which the Treasurer is responsible, and may be disbursed only in accordance with legislative authority. Gardner v. Board of Trustees, 226 N.C. 465, 38 S.E.2d 314 (1946); State v. Davis, 270 N.C. 1, 153 S.E.2d 749, cert. denied, 389 U.S. 828, 88 S. Ct. 87, 19 L. Ed. 2d 84 (1967).

Subsection (1) of this section states in language which no man can misunderstand that the legislative power is supreme over the public purse. State v. Davis, 270 N.C. 1, 153 S.E.2d 749, cert. denied, 389 U.S. 828, 88 S. Ct. 87, 19 L. Ed. 2d 84 (1967).

**Subsection (1) as Bar to Judicial Action.** — Subsection (1) of this section effectually bars any judicial action to enforce collection of liabilities against the State, and the courts cannot direct the State Treasurer to pay such claims, however just and unquestioned, when there is no legislative appropriation to pay the same. Garner v. Worth, 122 N.C. 250, 29 S.E. 364 (1898).

**When Mandamus Will Lie.** — It is only when the legislative department has appropriated a certain fund to the payment of a liability incurred or to be incurred and the Auditor or Treasurer refuses to obey the legislative mandate that the court can issue its mandamus to compel him to do so. Garner v. Worth, 122 N.C. 250, 29 S.E. 364 (1898).

**An order to make retroactive payments under the federal aid to dependent families program** looks directly to the payment of public funds out of the State treasury in violation of this section. Dawkins v. Craig, 483 F.2d 1191 (4th Cir. 1973), cert. denied, 415 U.S. 938, 94 S. Ct. 1454, 39 L. Ed. 2d 495 (1974).

**The State Treasurer may refuse to pay a warrant of the Auditor** if it appears that the law under which it is issued is unconstitutional or the claim is not within the terms of the statute under which it is brought. Martin v. Clark, 135 N.C. 178, 47 S.E. 397 (1904).

**Receipt of Funds by General Assembly from State or Agencies.** — The validity of any statute which provides that funds accruing to the State or any of its agencies "shall be received by the General Assembly" is questioned. Although the Constitution gives the General Assembly broad power to raise revenue and make appropriations, nothing in the Constitution authorizes the legislative branch actually to receive funds. In re Powers, 295 S.E.2d 589 (N.C. 1982).

**Applied** in Sanders v. State Personnel Comm'n, — N.C. App. —, 677 S.E.2d 182, 2009 N.C. App. LEXIS 687 (2009).

**Cited** in Heatherly v. State, 189 N.C. App. 213, 658 S.E.2d 11, 2008 N.C. App. LEXIS 530 (2008).

### OPINIONS OF ATTORNEY GENERAL

**As to the expenditure of public funds for public recreational facilities,** see opinion of Attorney General to Mr. Francis M. Coiner, Hendersonville City Attorney, 40 N.C.A.G. 494 (1969), under corresponding provisions of the Constitution of 1868.

## Sec. 8. Health care facilities.

Notwithstanding any other provisions of this Constitution, the General Assembly may enact general laws to authorize the State, counties, cities or towns, and other State and local governmental entities to issue revenue bonds to finance or refinance for any such governmental entity or any nonprofit private corporation, regardless of any church or religious relationship, the cost of acquiring, constructing, and financing health care facility projects to be operated to serve and benefit the public; provided, no cost incurred earlier than two years prior to the effective date of this section shall be refinanced. Such bonds shall be payable from the revenues, gross or net, of any such projects and any other health care facilities of any such governmental entity or nonprofit private corporation pledged therefor; shall not be secured by a pledge of the full faith and credit, or deemed to create an indebtedness requiring voter approval of any governmental entity; and may be secured by an agreement which may provide for the conveyance of title of, with or without consideration, any such project or facilities to the governmental entity or nonprofit private corporation. The power of eminent domain shall not be used pursuant hereto for nonprofit private corporations. (1975, c. 641, s. 1.)

**Defeated Amendment Proposal.** — An amendment proposed by Session Laws, 1973, c. 1222, and defeated at the general election held on Nov. 5, 1974, would have added a new G.S. 8 to this Article, relating to bond issues to finance capital projects for industry.

**Editor's Note.** — This section was added by constitutional amendment adopted by vote of the people at the election held March 23, 1976.

Session Laws 1975, c. 641, s. 4, provided:

"Sec. 4. This act shall be deemed to provide an alternative method for the doing of the things authorized hereby, shall be regarded as supplemental and additional to powers conferred by other laws and shall not be regarded as in derogation of any powers now existing, and this act shall not be construed as a limitation or restriction on the power of the General

Assembly to enact laws authorizing governmental entities to issue revenue bonds for health care purposes."

**Legal Periodicals.** — For article, "Removing Local Elected Officials From Office in North Carolina," see 16 Wake Forest L. Rev. 547 (1980).

## Sec. 9. Capital projects for industry.

Notwithstanding any other provision of this Constitution, the General Assembly may enact general laws to authorize counties to create authorities to issue revenue bonds to finance, but not to refinance, the cost of capital projects consisting of industrial, manufacturing and pollution control facilities for industry and pollution control facilities for public utilities, and to refund such bonds.

In no event shall such revenue bonds be secured by or payable from any public moneys whatsoever, but such revenue bonds shall be secured by and payable only from revenues or property derived from private parties. All such capital projects and all transactions therefor shall be subject to taxation to the extent such projects and transactions would be subject to taxation if no public body were involved therewith; provided, however, that the General Assembly may provide that the interest on such revenue bonds shall be exempt from income taxes within the State.

The power of eminent domain shall not be exercised to provide any property for any such capital project. (1975, c. 826, s. 1.)

**Editor's Note.** — This section was added by constitutional amendment adopted by vote of the people at the election held March 23, 1976.

## Sec. 10. Joint ownership of generation and transmission facilities.

In addition to other powers conferred upon them by law, municipalities owning or operating facilities for the generation, transmission or distribution of electric power and energy and joint agencies formed by such municipalities for the purpose of owning or operating facilities for the generation and transmission of electric power and energy (each, respectively, "a unit of municipal government") may jointly or severally own, operate and maintain works, plants and facilities, within or without the State, for the generation and transmission of electric power and energy, or both, with any person, firm, association or corporation, public or private, engaged in the generation, transmission or distribution of electric power and energy for resale (each, respectively, "a co-owner") within this State or any state contiguous to this State, and may enter into and carry out agreements with respect to such jointly owned facilities. For the purpose of financing its share of the cost of any such jointly owned electric generation or transmission facilities, a unit of municipal government may issue its revenue bonds in the manner prescribed by the General Assembly, payable as to both principal and interest solely from and secured by a lien and charge on all or any part of the revenue derived, or to be derived, by such unit of municipal government from the ownership and operation of its electric facilities; provided, however, that no unit of municipal government shall be liable, either jointly or severally, for any acts, omissions or obligations of any co-owner, nor shall any money or property of any unit of municipal government be credited or otherwise applied to the account of any co-owner or be charged with any debt, lien or mortgage as a result of any debt or obligation of any co-owner. (1977, c. 528, s. 1.)

**Editor's Note.** — This section was added by constitutional amendment adopted by vote of the people at the general election held Nov. 8, 1977.

CASE NOTES

**Cited** in State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 314 N.C. 171, 333 S.E.2d 259 (1985); State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (1987).

## Sec. 11. Capital projects for agriculture.

Notwithstanding any other provision of the Constitution the General Assembly may enact general laws to authorize the creation of an agency to issue revenue bonds to finance the cost of capital projects consisting of agricultural facilities, and to refund such bonds.

In no event shall such revenue bonds be secured by or payable from any public moneys whatsoever, but such revenue bonds shall be secured by and payable only from revenues or property derived from private parties. All such capital projects and all transactions therefor shall be subject to taxation to the extent such projects and transactions would be subject to taxation if no public body were involved therewith; provided, however, that the General Assembly may provide that the interest on such revenue bonds shall be exempt from income taxes within the State.

The power of eminent domain shall not be exercised to provide any property for any such capital project. (1983, c. 765, s. 1.)

**Editor's Note.** — This section was added by constitutional amendment adopted by vote of the people at the election held May 8, 1984.

Session Laws 1985 (Reg. Sess., 1986), c. 814, s. 1 and c. 933, s. 1 both added new sections to N.C. Const., Art. V. These amendments were adopted by vote of the people at the election held Nov. 4, 1986, and have been designated N.C. Const., Art. V, §§ 12 and 13 at the direction of the Revisor of Statutes.

**Defeated Amendment Proposals.** — An amendment proposed by Session Laws 1981, c. 808, s. 1, as amended by Session Laws 1981, c. 987, s. 1, and defeated at the election held June 29, 1982, would have added a new G.S. 11 to this Article, relating to seaport and airport facilities.

An amendment proposed by Session Laws 1981, c. 887, s. 1, and defeated at the election held June 29, 1982, would have added a new G.S. 11 to this Article, relating to higher education facilities.

An amendment proposed by Session Laws 1981 (Reg. Sess. 1982), c. 1247, s. 1, and defeated at the election held in 1982 would have added a new G.S. 11 to this Article, relating to the definition of territorial areas in or near the central business district of a city or town and the borrowing of money to finance development projects therein.

## Sec. 12. Higher education facilities.

Notwithstanding any other provisions of this Constitution, the General Assembly may enact general laws to authorize the State or any State entity to issue revenue bonds to finance and refinance the cost of acquiring, constructing, and financing higher education facilities to be operated to serve and benefit the public for any nonprofit private corporation, regardless of any church or religious relationship provided no cost incurred earlier than five years prior to the effective date of this section shall be refinanced. Such bonds shall be payable from any revenues or assets of any such nonprofit private corporation pledged therefor, shall not be secured by a pledge of the full faith and credit of the State or such State entity or deemed to create an indebtedness requiring voter approval of the State or such entity, and, where the title to such facilities is vested in the State or any State entity, may be secured by an agreement which may provide for the conveyance of title to, with or without consideration, such facilities to the nonprofit private corporation. The power of eminent domain shall not be used pursuant hereto. (1985 (Reg. Sess., 1986), c. 814.)

**Cross References.** — For the Private Capital Facilities Finance Act, see G.S. 159D-35 et seq.

**Editor's Note.** — This section was added by constitutional amendment adopted by vote of the people at the election held Nov. 4, 1986, and became effective November 25, 1986.

## Sec. 13. Seaport and airport facilities.

(1) Notwithstanding any other provision of this Constitution, the General Assembly may enact general laws to grant to the State, counties, municipalities, and other State and local governmental entities all powers useful in connection with the development of new and existing seaports and airports, and to authorize such public bodies:

(a) To acquire, construct, own, own jointly with public and private parties, lease as lessee, mortgage, sell, lease as lessor, or otherwise dispose of lands and facilities and improvements, including undivided interests therein;

(b) To finance and refinance for public and private parties seaport and airport facilities and improvements which relate to, develop or further waterborne or airborne commerce and cargo and passenger traffic, including commercial, industrial, manufacturing, processing, mining, transportation, distribution, storage, marine, aviation and environmental facilities and improvements; and

(c) To secure any such financing or refinancing by all or any portion of their revenues, income or assets or other available monies associated with any of their seaport or airport facilities and with the facilities and improvements to be financed or refinanced, and by foreclosable liens on all or any part of their properties associated with any of their seaport or airport facilities and with the facilities and improvements to be financed or refinanced, but in no event to create a debt secured by a pledge of the faith and credit of the State or any other public body in the State. (1985 (Reg. Sess., 1986), c. 933, s. 1.)

**Cross References.** — As to specific powers of municipalities, see G.S. 63-53. For the North Carolina Global TransPark Authority Act, see G.S. 63A-1 et seq.

**Editor's Note.** — This section was added by constitutional amendment adopted by vote of the people at the election held Nov. 4, 1986, and became effective November 25, 1986.

As enacted and adopted, this section contained the designation "(1)," but no designation "(2)."

## Sec. 14. Project development financing.

Notwithstanding Section 4 of this Article, the General Assembly may enact general laws authorizing any county, city, or town to define territorial areas in the county, city, or town and borrow money to be used to finance public improvements associated with private development projects within the territorial areas, as provided in this section. The General Assembly shall set forth by statute the method for determining the size of the territorial area and the issuing unit. This method is conclusive. When a territorial area is defined pursuant to this section, the county shall determine the current assessed value of taxable real and personal property in the territorial area. Thereafter, property in the territorial area continues to be subject to taxation to the same extent and in like manner as property not in the territorial area, but the net proceeds of taxes levied on the excess, if any, of the assessed value of taxable real and personal property in the territorial area at the time the taxes are levied over the assessed value of taxable real and personal property in the territorial area at the time the territorial area was defined may be set aside. The instruments of indebtedness authorized by this section shall be secured by these set-aside proceeds. The General Assembly may authorize a county, city, or town issuing these instruments of indebtedness to pledge, as additional security, revenues available to the issuing unit from sources other than the issuing unit's exercise of its taxing power. As long as no revenues are pledged other than the set-aside proceeds authorized by this section and the revenues authorized in the preceding sentence, these instruments of indebtedness may be issued without approval by referendum. The county, city, or town may not pledge as security for these instruments of indebtedness any property tax revenues other than the set-aside proceeds authorized in this section, or in any other manner pledge its full faith and credit as security for these instruments of indebtedness unless a vote of the people is held as required by and in compliance with the requirements of Section 4 of this Article.

Notwithstanding the provisions of Section 2 of this Article, the General Assembly may enact general laws authorizing a county, city, or town that has defined a territorial area pursuant to this section to assess property within the territorial area at a minimum value if agreed to by the owner of the property, which agreed minimum value shall be binding on the current owner and any future owners as long as the defined territorial area is in effect. (2003-403, s. 1.)

**Defeated Amendment Proposal.** — An amendment proposed by Session Laws 1993, c. 497, s. 1, and defeated at the election held November 2, 1993, would have added a new Section 14 relating to the authority of any county, city or town to borrow money, without the need of voter approval, and issue financing bonds to be used to finance public activities associated with private economic development projects.

**Editor's Note.** — Session Laws 2003-403, ss. 24 and 25, provide: "The amendment set out in Section 1 of this act shall be submitted to the qualified voters of the State at the statewide general election in November 2004, which election shall be conducted under the laws then governing elections in the State. Ballots, voting systems, or both may be used in accordance with Chapter 163 of the General Statutes. The question to be used in the voting systems and ballots shall be:

"[ ] FOR [ ] AGAINST

"Constitutional amendment to promote local economic and community development projects by (i) permitting the General Assembly to enact general laws giving counties, cities, and towns the power to finance public improvements associated with qualified private economic and community improvements within development districts, as long as the financing is secured by the additional tax revenues resulting from the enhanced property value within the development district and is not secured by a pledge of the local government's faith and credit or general taxing authority, which financing is not subject to a referendum; and (ii) permitting the owners of property in the development district to agree to a minimum tax value for their property, which is binding on future owners as long as the development district is in existence.

"If a majority of votes cast on the question are in favor of the amendment set out in Section 1 of this act, the State Board of Elections shall certify the amendment to the Secretary of State. The amendment set out in Section 1 of this act and the amendments set out in Sections 2 through 21 of this act become effective upon this certification. The Secretary of State shall enroll the amendment so certified among the permanent records of that office. If a majority of votes cast on the question are not in favor of the amendment set out in Section 1 of this act, that amendment and the amendments set out in Sections 2 through 21 of this act do not go into effect."

This section was added by constitutional amendment adopted by vote of the people at the general election held November 2, 2004, and the results of the election were certified by the State Board of Elections.

Session Laws 2003-403, s. 22, provides that Session Laws 2003-403, being necessary for the prosperity and welfare of North Carolina and it's inhabitants, shall be liberally construed to effect its purposes.

Session Laws 2003-403, s. 23, is a severability clause.

**Legal Periodicals.** — For note, "Tax Increment Financing in North Carolina: The Myth of the Countermajoritarian Difficulty," see 83 N.C. L. Rev. 1526 (2005).

# ARTICLE VI

# SUFFRAGE AND ELIGIBILITY TO OFFICE

## Section 1. Who may vote.

Every person born in the United States and every person who has been naturalized, 18 years of age, and possessing the qualifications set out in this Article, shall be entitled to vote at any election by the people of the State, except as herein otherwise provided. (1971, c. 201, s. 1; c. 1141, s. 1.)

**Cross References.** — As to voter qualifications, see N.C. Const., Art. VI, § 2. For statutory provisions as to qualifications of voters, see G.S. 163-54 et seq.

**History.** — The provisions of this section are similar to those of Art. VI, § 1, Const. 1868, as that article was rewritten in 1900 and as amended in 1946.

### CASE NOTES

**As to history of this Article,** see Lassiter v. Northampton County Bd. of Elections, 248 N.C. 102, 102 S.E.2d 853 (1958), aff'd, 360 U.S. 45, 79 S. Ct. 985, 3 L. Ed. 2d 1072 (1959).

**Eligibility of 18 Year Olds to Vote.** — Eighteen-year olds are now sui juris, and if they possess the qualifications prescribed by law for all voters, are eligible to vote. Hall v. Wake County Bd. of Elections, 280 N.C. 600, 187 S.E.2d 52 (1972).

### OPINIONS OF ATTORNEY GENERAL

**A person must be 21 years old by the date of the general election in order to be elected to the House of Representatives.** See opinion of Attorney General to Mr. William R. Gilkeson, Jr., Staff Attorney, Research Division, Legislative Services Office, North Carolina General Assembly, 1999 N.C. AG LEXIS 33 (11/3/99).

## Sec. 2. Qualifications of voter.

(1) *Residence period for State elections.* Any person who has resided in the State of North Carolina for one year and in the precinct, ward, or other election district for 30 days next preceding an election, and possesses the other qualifications set out in this Article, shall be entitled to vote at any election held in this State. Removal from one precinct, ward, or other election district to another in this State shall not operate to deprive any person of the right to vote in the precinct, ward, or other election district from which that person has removed until 30 days after the removal.

(2) *Residence period for presidential elections.* The General Assembly may reduce the time of residence for persons voting in presidential elections. A person made eligible by reason of a reduction in time of residence shall possess the other qualifications set out in this Article, shall only be entitled to vote for President and Vice President of the United States or for electors for President and Vice President, and shall not thereby become eligible to hold office in this State.

(3) *Disqualification of felon.* No person adjudged guilty of a felony against this State or the United States, or adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, shall be permitted to vote unless that person shall be first restored to the rights of citizenship in the manner prescribed by law.

**History.** — The provisions of this section are similar to those of Art. VI, § 2, Const. 1868, as added in 1900 and amended in 1920, 1954 and 1962.

**Legal Periodicals.** — For comment, "State Durational Residence Requirements as a Violation of the Equal Protection Clause," see 3 N.C. Cent. L.J. 233 (1972).

For survey of 1972 case law on student suffrage, see 51 N.C.L. Rev. 1060 (1973).

## CASE NOTES

***Editor's Note.*** — *Some of the cases cited below were decided under former Art. VI, § 2, Const. 1868, as amended.*

**One-Year Residency Requirement Invalid As Applied to Local Elections.** — The one-year durational residency requirement, as it relates to the right to vote in local elections, is unconstitutional and invalid, as violative of the equal protection clause of the U.S. Const., Amend. XIV. Andrews v. Cody, 327 F. Supp. 793 (M.D.N.C. 1971), aff'd, 405 U.S. 1034, 92 S. Ct. 1306, 31 L. Ed. 2d 576 (1972).

**Denial of right to vote to convicted felon is not cruel and unusual punishment.** Fincher v. Scott, 352 F. Supp. 117 (M.D.N.C. 1972), aff'd, 411 U.S. 961, 93 S. Ct. 2151, 36 L. Ed. 2d 681 (1973).

**U.S. Const., Amend. XIV, § 2, Expressly Allows Exclusion of Felons.** — A State may constitutionally continue the "historic exclusion" of felons from the franchise without regard to whether such exclusion can pass muster under the equal protection clause, because U.S. Const., Amend. XIV, § 2, expressly allows the exclusion of felons from the franchise without reduction of representation. Fincher v. Scott, 352 F. Supp. 117 (M.D.N.C. 1972), aff'd, 411 U.S. 961, 93 S. Ct. 2151, 36 L. Ed. 2d 681 (1973).

Provisions in State statutes and constitutions which deny convicted felons the right to vote and hold office do not violate the various rights guaranteed by the Constitution of the United States. Wilson v. Goodwyn, 522 F. Supp. 1214 (E.D.N.C. 1981).

**"Residence" Defined.** — Residence, as used in this section, is synonymous with domicile, denoting a permanent dwelling place to which the party, when absent, intends to return. State ex rel. Hannon v. Grizzard, 89 N.C. 115 (1883); State ex rel. Owens v. Chaplin, 228 N.C. 705, 47 S.E.2d 12, petition for rehearing denied, 229 N.C. 797, 48 S.E.2d 37 (1948); Baker v. Varser, 240 N.C. 260, 82 S.E.2d 90 (1954).

"Residence," within the purview of this provision, is synonymous with domicile, and as used in the North Carolina Constitution of 1970 continues to mean domicile. Hall v. Wake County Bd. of Elections, 280 N.C. 600, 187 S.E.2d 52 (1972).

**Duration of Residence.** — A person, in order to become a qualified elector in this State, must have come into the State a year before the election, or have been domiciled within it for 12 months after forming the purpose to remain, and the same intent must be concurrent with the actual occupation of a domicile in the county in order to entitle him to the rights of an elector within its limits. People ex rel. Boyer v. Teague, 106 N.C. 576, 11 S.E. 665 (1890).

**Residence Must Be of Permanent Character.** — In order to acquire a residence for the purpose of exercising the right to vote in a given locality, the "residence" must be of a permanent and not of a temporary character, corresponding with the word domicile. State ex rel. Gower v. Carter, 195 N.C. 697, 143 S.E. 513 (1928).

**General Assembly Cannot Increase Length of Residence Requirement.** — The General Assembly cannot in any way change the qualifications of voters in State, county, township, city or town elections; thus, an act which requires a longer residence in the county than this section requires is unconstitutional. People ex rel. Van Bokkelen v. Canaday, 73 N.C. 198 (1875).

**Qualifications for Municipal Election.** — The qualifications of voters in a municipal election are the same as in a general one. State ex rel. Gower v. Carter, 194 N.C. 293, 139 S.E. 604 (1927).

Cities and towns, like counties and townships, are parts and parcels of the State, organized for the convenience of local self-government; and the qualifications of voters are the same. People ex rel. Van Bokkelen v. Canaday, 73 N.C. 198 (1875).

**Limitations on Voting Imposed by Municipality.** — A provision in the charter of a municipality limiting the right of suffrage in municipal elections to owners of real property within the town is unconstitutional. Smith v. Town of Carolina Beach, 206 N.C. 834, 175 S.E. 313 (1934).

A provision in a town charter permitting nonresident freeholders to vote in all municipal elections is void because in conflict with this section. However, an election held under this provision is not void if it is shown that no persons not qualified under the Constitution actually participated in the election. Wrenn v. Town of Kure Beach, 235 N.C. 292, 69 S.E.2d 492 (1952).

**This constitutional provision applies primarily to an incoming person,** who is not permitted to exercise political rights until after he has been in the State and the voting precinct for the prescribed periods. State ex rel. Owens

v. Chaplin, 228 N.C. 705, 47 S.E.2d 12, petition for rehearing denied, 229 N.C. 797, 48 S.E.2d 37 (1948).

**And Not to a Citizen of this State Who Is Temporarily Absent.** — This constitutional provision is not designed to disfranchise a citizen of the State when he leaves his home and goes into another state or into another county of this State for temporary purposes with the intention of retaining his home and of returning to it when the objects which call him away are attained. State ex rel. Owens v. Chaplin, 228 N.C. 705, 47 S.E.2d 12, petition for rehearing denied, 229 N.C. 797, 48 S.E.2d 37 (1948).

**Where a voter was in the service of the federal government at Washington, D.C.,** but continued to pay poll tax and vote in Halifax County, and spent a part of each year at his home in Halifax, his constitutional residence remained unchanged in Halifax. Baker v. Varser, 240 N.C. 260, 82 S.E.2d 90 (1954).

**Protracted Residence Abroad.** — A protracted residence abroad of one engaged in business and with no home in this State is not consistent with the idea of residence here. State ex rel. Hannon v. Grizzard, 89 N.C. 115 (1883).

**Residence Near Precinct Line.** — When a voter resides on or so near the precinct line, or where the line is so uncertain, that it is doubtful in which precinct the voter lives, and the voter, honestly and in good faith, bona fide registers and votes in the precinct he, in good faith, alleges and believes he lives in, and has good reason to believe he is correct, and registers and votes in no other precinct, such vote is legal. People ex rel. Boyer v. Teague, 106 N.C. 576, 11 S.E. 665 (1890).

**Failure to Administer Oath to Electors.** — The mere failure of the registrars (now chief judges) to administer the oath to the electors, and allowing them to vote where not challenged, will not affect the result of the election held for the establishment of a special road district under valid legislative authority, when the electors so voting are qualified. Woodall v. Western Wake Hwy. Comm'n, 176 N.C. 377, 97 S.E. 226 (1918).

**Vote by Convicted Criminal.** — In a contested election case, conviction of an offense under a local law prescribing punishment in the State's prison renders void the vote of the one so convicted, whether the indictment charged or failed to charge that the alleged offense was "feloniously" committed. State ex rel. Robertson v. Jackson, 183 N.C. 695, 110 S.E. 593 (1922).

**Vote of Escaped Prisoner.** — If a person in jail for a misdemeanor (not infamous), and sentenced to imprisonment, escapes, and before he is recaptured his term or sentence expires, and he votes in his own precinct, in which he resided before he was sentenced, such vote is valid if the voter is otherwise qualified; but if the voter is a fugitive from justice, and is in hiding from one part of the county to another, and voted in the precinct he happened to be in, and not in the precinct of his residence when sentenced, such vote is illegal. People ex rel. Boyer v. Teague, 106 N.C. 576, 11 S.E. 665 (1890).

**Cited** in United States v. McLean, 904 F.2d 216 (4th Cir. 1990); Farnsworth v. Jones, 114 N.C. App. 182, 441 S.E.2d 597 (1994); James v. Bartlett, 359 N.C. 260, 607 S.E.2d 638, 2005 N.C. LEXIS 146 (2005).

### OPINIONS OF ATTORNEY GENERAL

**Nolo Contendere Plea Brings No Forfeiture of Rights.** — At least under the wording of N.C. Const., Art. VI, § 2, a plea of nolo contendere or "no contest" to a felony charge would not result in the forfeiture of any rights of citizenship, including the right to vote. See opinion of Attorney General to Ms. Bessie J. Cherry, Clerk of Court, Washington, North Carolina, 49 N.C.A.G. 134 (1980).

## Sec. 3. Registration.

Every person offering to vote shall be at the time legally registered as a voter as herein prescribed and in the manner provided by law. The General Assembly shall enact general laws governing the registration of voters.

**History.** — The provisions of this section are similar to those of Art. VI, § 3, Const. 1868, as the article was rewritten in 1900.

### CASE NOTES

***Editor's Note.*** — *The cases cited below were decided under former Art. VI, §§ 3 and 4, Const. 1868, as amended.*

**Registration is essential** to the exercise by a citizen, possessed of the of the other legal qualifications, of his right to vote, and when duly made, is prima facie evidence of the right. State ex rel. Hampton v. Waldrop, 104 N.C. 453, 10 S.E. 694 (1889).

**And Entitles Elector to Vote.** — The registration of an elector who is qualified to vote must be accepted as the act of a public officer, and entitles the elector to cast his vote. State ex rel. DeBerry v. Nicholson, 102 N.C. 465, 9 S.E. 545 (1889).

**Literacy Requirement.** — The provisions of a former G.S. 163-28 which provided that a person presenting himself for registration had to, before he was registered, prove to the satisfaction of the registrar (now chief judge) his ability to read and write any section of the Constitution, was held valid, since authority was granted to the legislature by this section to enact general legislation to carry out the provisions of this Article. Allison v. Sharp, 209 N.C. 477, 184 S.E. 27 (1936). See also, N.C. Const., Art. VI, § 4, and notes thereunder.

**Where the registration book of an election precinct was lost,** and could not be replaced, but the registrar (now chief judge) procured a new book, in which he entered the names of such persons as he knew had theretofore been registered, and also the names of those who applied for registration subsequently, and it appeared that at the election following, no one voted whose name did not appear on the registration book, no one voted who was not entitled to vote, and no one who was entitled to vote was excluded, the election was valid. State ex rel. Hampton v. Waldrop, 104 N.C. 453, 10 S.E. 694 (1889).

**An act authorizing a bond issue by a county** was not objectionable as violating this section upon the ground that it empowered the county commissioners to order a new registration. Cox v. Commissioners of Pitt County, 146 N.C. 584, 60 S.E. 516 (1908).

## Sec. 4. Qualification for registration.

Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language.

**History.** — The provisions of this section are similar to those of the first sentence of Art. VI, § 4, Const. 1868, as added in 1900 and amended in 1920.

**Defeated Amendment Proposal.** — Session Laws 1969, c. 1004, s. 1, proposed to strike from this Article all of § 4, and to renumber § 5 through 10 as §§ 4 through 9. The amendment failed of adoption at the general election held Nov. 3, 1970.

### CASE NOTES

***Editor's Note.** — The cases cited below were decided under former Art. VI, § 4, Const. 1868, as amended.*

**The language of this section is mandatory.** Allison v. Sharp, 209 N.C. 477, 184 S.E. 27 (1936).

**Validity of Literacy Requirement.** — Use of the literacy test as a prerequisite to registering to vote has the effect of denying or abridging the right to vote on account of race or color where it places an onerous burden on the black citizens for whom a county has maintained separate and inferior schools. Gaston County v. United States, 395 U.S. 285, 89 S. Ct. 1720, 23 L. Ed. 2d 309 (1969).

The provision of a former G.S. 163-28 which required all persons applying for registration to be able to read and write any section of the Constitution as an educational qualification to the right to vote was held authorized by this Article, and, since it applied alike to all persons who presented themselves for registration to vote, it made no discrimination based on race, creed or color, and therefore did not conflict with U.S. Const., Amends. XIV, XV, or XVII. Lassiter v. Northampton County Bd. of Elections, 248 N.C. 102, 102 S.E.2d 853 (1958), aff'd, 360 U.S. 45, 79 S. Ct. 985, 3 L. Ed. 2d 1072 (1959).

**Former G.S. 163-28, requiring the registrar (now chief judge) to determine** whether or not an individual was able to read and write any section of the Constitution in the English language, was a reasonable provision, as the registrar (now chief judge) was the logical person to carry out the provisions of the Constitution. Allison v. Sharp, 209 N.C. 477, 184 S.E. 27 (1936).

## Sec. 5. Elections by people and General Assembly.

All elections by the people shall be by ballot, and all elections by the General Assembly shall be viva voce. A contested election for any office established by

Article III of this Constitution shall be determined by joint ballot of both houses of the General Assembly in the manner prescribed by law.

**History.** — The provisions of the first sentence of this section are similar to those of Art. II, § 9, Const. 1868, and Art. VI, § 6, Const. 1868, as Art. VI was rewritten in 1900. The provisions of the second sentence of this section are similar to those of the second sentence of Art. III, § 3, Const. 1868, as amended in 1926.

### CASE NOTES

*Editor's Note. — Some of the cases cited below were decided under former Art. II, § 9, and former Art. VI, § 6, Const. 1868, as rewritten in 1900.*

**Secrecy of Ballot.** — The provisions of this section imply that in elections by the people the ballot shall be a secret one. Withers v. Board of County Comm'rs, 196 N.C. 535, 146 S.E. 225 (1929).

It is not necessary to show undue influence or intimidation for the courts to declare an election void when the voters have been deprived of their right to a secret ballot. Withers v. Board of County Comm'rs, 196 N.C. 535, 146 S.E. 225 (1929).

A voter at an election does not waive his constitutional right to a secret ballot by not protesting, unless he has been made aware of his rights under the facts and circumstances of the balloting. Withers v. Board of County Comm'rs, 196 N.C. 535, 146 S.E. 225 (1929).

**How Elector May Deposit Ballot.** — The provisions of this section give the elector the choice to deposit his own ballot secretly, or to declare his choice openly when depositing it, or to have the registrar (now chief judge) or one of the judges of election, deposit it for him. Jenkins v. State Bd. of Elections, 180 N.C. 169, 104 S.E. 346 (1920).

**Presumption of Regularity of Legislative Election.** — Where a certificate shows that there was a legislative election of an officer, nothing else appearing, the law presumes a quorum and that the election was regular. State ex rel. Cherry v. Burns, 124 N.C. 761, 33 S.E. 136 (1899).

**Cited** in James v. Bartlett, 359 N.C. 260, 607 S.E.2d 638, 2005 N.C. LEXIS 146 (2005).

### OPINIONS OF ATTORNEY GENERAL

**Provisional Ballots.** — Ordinarily, applications to vote provisionally are viewed as public records which must be disclosed pursuant to Chapter 132 of the North Carolina General Statutes, because these documents are separate from ballots and there are a sufficient quantity of provisional ballots so that no vote could be attributed to any particular provisional voter. However, when there is only one provisional voter, that voter has an overriding and personal right to a secret ballot under this section, and a County Board of Elections is prohibited from disclosing any information that would identify the provisional voter. See opinion of Attorney General to Mr. Stephen T. Gheen, Chairman Gaston County Board of Elections, 1997 N.C.A.G. 67 (11/6/97).

## Sec. 6. Eligibility to elective office.

Every qualified voter in North Carolina who is 21 years of age, except as in this Constitution disqualified, shall be eligible for election by the people to office. (1971, c. 201, s. 1; c. 1141, s. 1.)

**History.** — The provisions of this section are similar to those of the first clause of Art. VI, § 7, Const. 1868, as that article was rewritten in 1900.

**Legal Periodicals.** — For note, "Baker v. Martin and the Constitutionality of Partisan Qualifications for Appointment to District Courts," see 70 N.C.L. Rev. 1916 (1992).

### CASE NOTES

**Legislature Cannot Increase Qualifications.** — The legislature cannot add to the constitutional disqualifications to hold office by requiring candidates for the position of recorder in a municipal court to be licensed attorneys at law. State ex rel. Spruill v. Bateman, 162 N.C. 588, 77 S.E. 768 (1913), decided under former Art. VI, § 7, Const. 1868, as rewritten in 1900.

**The words "by the people"** make it clear the section refers to the process of election. Baker v. Martin, 330 N.C. 331, 410 S.E.2d 887 (1991).

**Section Refers to Election to Office.** — The history of this section supports the conclusion that it is meant to refer to an "election to office" situation rather than to appointment to an "elective office." Baker v. Martin, 330 N.C. 331, 410 S.E.2d 887 (1991).

**Women as Public Officers.** — A woman is qualified to act as a notary public since the adoption of U.S. Const., Amend. XIX, and also to pass upon the proper probate of a deed to lands and make a valid certificate for its registration, when thereto deputized by the clerk of the superior court. Preston v. Roberts, 183 N.C. 62, 110 S.E. 586 (1922), decided under former Art. VI, § 7, Const. 1868, as rewritten in 1900; for the former rule, see State ex rel. Attorney-General v. Knight, 169 N.C. 333, 85 S.E. 418 (1915).

**Subsection (a) of this section imposes an unconstitutional additional qualification for election to office,** contrary to the provisions of this section. Moore v. Knightdale Bd. of Elections, 331 N.C. 1, 413 S.E.2d 541 (1992).

**Preference May Be Given to Political Party of Vacating Judge.** — Section 7A-142, which provides that candidates for a vacancy in the office of a district judge shall be members of the same political party as the vacating judge, does not violate the Constitution of North Carolina. Baker v. Martin, 330 N.C. 331, 410 S.E.2d 887 (1991).

**Cited** in Royal v. State, 153 N.C. App. 495, 570 S.E.2d 738, 2002 N.C. App. LEXIS 1167 (2002).

### OPINIONS OF ATTORNEY GENERAL

**Qualifications are for "elective office";** thus, a sheriff's deputy need not reside in the county in which he serves. See opinion of Attorney General to Sheriff John H. Stockard, 41 N.C.A.G. 754 (1972).

**A person must be 21 years old by the date of the general election in order to be elected to the House of Representatives.** See opinion of Attorney General to Mr. William R. Gilkeson, Jr., Staff Attorney, Research Division, Legislative Services Office, North Carolina General Assembly, 1999 N.C. AG LEXIS 33 (11/3/99).

## Sec. 7. Oath.

Before entering upon the duties of an office, a person elected or appointed to the office shall take and subscribe the following oath:

"I, __________, do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully discharge the duties of my office as __________, so help me God."

**History.** — The provisions of this section are similar to those of Art. VI, § 7, Const. 1868, as that article was rewritten in 1900.

### CASE NOTES

**Cited** in .

## Sec. 8. Disqualifications for office.

The following persons shall be disqualified for office:

First, any person who shall deny the being of Almighty God.

Second, with respect to any office that is filled by election by the people, any person who is not qualified to vote in an election for that office.

Third, any person who has been adjudged guilty of treason or any other felony against this State or the United States, or any person who has been adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, or any person who has been adjudged guilty of

**corruption or malpractice in any office, or any person who has been removed by impeachment from any office, and who has not been restored to the rights of citizenship in the manner prescribed by law.**

**History.** — The provisions of this section are similar to those of Art. VI, § 8, Const. 1868, as that article was rewritten in 1900.

**Legal Periodicals.** — For essay, "Something There Is That Doesn't Love a Wall: Reflections on the History of North Carolina's Religious Test for Public Office," see 64 N.C.L. Rev. 1071 (1986).

## CASE NOTES

**"Adjudged" Defined.** — The word "adjudged" means "to decide or rule upon as a judge or with judicial or quasi-judicial powers." In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

**"Guilty" Defined.** — The word "guilty" connotes evil, intentional wrongdoing and refers to conscious and culpable acts; it does not necessarily mean or require criminal conviction or the finding of a jury. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

**The definitions of "adjudged" and "guilty" are broad enough to encompass an adjudication by the Supreme Court,** pursuant to the provisions of G.S. 7A-376, that a judge is guilty of willful misconduct in office. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

**Criminal Conviction Unnecessary for Disqualification.** — Substitution in this section of the term "adjudged guilty" for the term "convicted" permits the General Assembly to prescribe proceedings in addition to criminal trials in which an adjudication of guilt will result in disqualification from office. Pursuant to that authorization, the legislature enacted G.S. 7A-376, barring a judge from future judicial office when he has been removed by this court for willful misconduct in office. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

**Adjudication of "Willful Misconduct in Office" Equivalent to "Malpractice in Any Office" for Removal Purposes.** — An adjudication of "willful misconduct in office" by the Supreme Court in a proceeding instituted by the Judicial Standards Commission in which the judge or justice involved has been accorded due process of law and his guilt established by "clear and convincing evidence" is equivalent to an adjudication of guilt of "malpractice in any office" as used in this section. Therefore, the legislature acted within its power when it made disqualification from judicial office a consequence of removal for willful misconduct under G.S. 7A-376. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

**Disqualification Not Part of Judgment.** — Disqualification from office and loss of the right of suffrage, imposed by this section upon persons convicted of infamous offenses, constitute no part of the judgment of the court, but are mere consequences of such judgment. State v. Jones, 82 N.C. 685 (1880), decided under former Art. VI, § 8, Const. 1868, as rewritten in 1900.

**Additional Disqualifications.** — The wording of this section does not necessarily imply that additional disqualifications cannot be added by the General Assembly for those persons not elected by the people. Instead this section merely enumerates three disqualifications, one of which applies only to offices filled by election by the people. Baker v. Martin, 330 N.C. 331, 410 S.E.2d 887 (1991).

**Removal of Prosecuting Attorney.** — A prosecuting attorney is removable from office as a matter of law or legal inference upon findings of his willful misconduct or maladministration in office, supported by evidence. State ex rel. Hyatt v. Hamme, 180 N.C. 684, 104 S.E. 174 (1920), decided under former Art. VI, § 8, Const. 1868, as rewritten in 1900.

**Appeal from Judgment that Prosecuting Attorney Be Removed.** — An appeal from judgment of superior court judge that a prosecuting attorney be removed for "willful misconduct or maladministration in office," etc., is upon questions of law and legal inference, if justified by the findings of fact supported by evidence. State ex rel. Hyatt v. Hamme, 180 N.C. 684, 104 S.E. 174 (1920), decided under former Art. VI, § 8, Const. 1868, as rewritten in 1900.

**Cited** in Brooks v. Edwards, 396 F. Supp. 662 (W.D.N.C. 1974); Broughton v. North Carolina, 717 F.2d 147 (4th Cir. 1983); United States v. McLean, 904 F.2d 216 (4th Cir. 1990).

### OPINIONS OF ATTORNEY GENERAL

**Requirement That Applicant for Office Admit Existence of God Violates U.S. Const., Amend. I.** — See opinion of Attorney General to Mr. Clyde Smith, Deputy Secretary of State, 41 N.C.A.G. 727 (1972).

**Nolo Contendere Plea Brings No Forfeiture of Rights.** — At least under the wording of N.C. Const., Art. VI, § 2, a plea of nolo contendere or "no contest" to a felony charge would not result in the forfeiture of any rights of citizenship, including the right to vote. See opinion of Attorney General to Ms. Bessie J. Cherry, Clerk of Court, Washington, North Carolina, 49 N.C.A.G. 134 (1980).

## Sec. 9. Dual office holding.

(1) *Prohibitions.* It is salutary that the responsibilities of self-government be widely shared among the citizens of the State and that the potential abuse of authority inherent in the holding of multiple offices by an individual be avoided. Therefore, no person who holds any office or place of trust or profit under the United States or any department thereof, or under any other state or government, shall be eligible to hold any office in this State that is filled by election by the people. No person shall hold concurrently any two offices in this State that are filled by election of the people. No person shall hold concurrently any two or more appointive offices or places of trust or profit, or any combination of elective and appointive offices or places of trust or profit, except as the General Assembly shall provide by general law.

(2) *Exceptions.* The provisions of this Section shall not prohibit any officer of the military forces of the State or of the United States not on active duty for an extensive period of time, any notary public, or any delegate to a Convention of the People from holding concurrently another office or place of trust or profit under this State or the United States or any department thereof.

**Cross References.** — As to action by Attorney General when a person unlawfully holds office, acts to forfeit his office, etc., see G.S. 1-515.

**History.** — The provisions of this section are similar to those of Art. XIV, § 7, Const. 1868, as amended in 1872-1873, 1944 and 1962.

### CASE NOTES

***Editor's Note.*** — *Most of the cases cited below were decided under former Art. XIV, § 7, Const. 1868, as amended.*

**Purpose.** — The manifest intent of this section is to prevent double office holding, that is, that offices and places of public trust should not accumulate in any single person, and the superadded words of "places of trust or profit" were put in to avoid evasion in giving too technical a meaning to the preceding words. Doyle v. Aldermen of Raleigh, 89 N.C. 133 (1883), approved in Groves v. Barden, 169 N.C. 8, 84 S.E. 1042 (1915).

**This section was never intended to discourage public officials from assuming military leadership** in time of emergency. In re Yelton, 223 N.C. 845, 28 S.E.2d 567 (1944).

**One Person May Not Hold Two Offices.** — Under this section, which is intended and designed to prevent or inhibit double office holding, except in certain instances, it is not permissible for one person to hold two offices at the same time. In re Yelton, 223 N.C. 845, 28 S.E.2d 567 (1944); In re Advisory Opinion, 226 N.C. 772, 39 S.E.2d 217 (1946).

**Dual Candidacy.** — The trial court properly refused to declare G.S. 163-106 and 163-323 unconstitutional although, taken together, they created a "loophole" which allowed a candidate to run for a superior court seat and another office on the same election day, regardless of the filing periods; the provisions do not create a benefit to lawyers while denying non-lawyers the equal protection of the law, they do not remove the election process from the hands of the voters, and they do not allow dual officeholding in violation of this section although they do allow dual candidacy. Comer v. Ammons, 135 N.C. App. 531, 522 S.E.2d 77, 1999 N.C. App. LEXIS 1179 (1999).

**Definition of Public Office.** — An "office" is a public station or employment conferred by appointment of government; and the term embraces the idea of tenure, duration, emolument, and duties. In re Advisory Opinion, 226 N.C. 772, 39 S.E.2d 217 (1946).

**Effect of Local Law.** — Chapter 129 of the 1983 N.C. Laws, insofar as it provides for dual office holding in a local law, is unconstitutional. Ratcliff v. County of Buncombe, 663 F. Supp. 1003 (W.D.N.C. 1987).

**Where the office which a judge proposed to accept** carried with it some of the attributes of sovereignty, and perforce invested him with governmental authority, he would be holding an office or place of trust or profit under the United States, or a department thereof, within the meaning of this section. In re Advisory Opinion, 226 N.C. 772, 39 S.E.2d 217 (1946).

**Acceptance of Second Office Vacates First Office.** — Where one holding an "office or place of profit" accepts another such office or position in contravention of this section, the first is vacated eo instanti, and any further acts done by him in connection with the first office are without color, and cannot be de facto. Whitehead v. Pittman, 165 N.C. 89, 80 S.E. 976 (1914).

The acceptance of a second office which is forbidden or incompatible with the office already held operates ipso facto to vacate the first. In re Yelton, 223 N.C. 845, 28 S.E.2d 567 (1944); In re Advisory Opinion, 226 N.C. 772, 39 S.E.2d 217 (1946).

The acceptance of a second office by one holding a public office operates ipso facto to vacate the first. While the officer has a right to elect which he will retain, his election is deemed to have been made when he accepts and qualifies for the second. Thus, the acceptance of the second office is of itself a resignation of the first. State ex rel. Barnhill v. Thompson, 122 N.C. 493, 29 S.E. 720 (1898); Whitehead v. Pittman, 165 N.C. 89, 80 S.E. 976 (1914).

Where a man accepts an office under the State, he vacates another held under the same sovereignty. State v. Cook, 273 N.C. 377, 160 S.E.2d 49 (1968).

**As of Date of Acceptance.** — Where a vacancy in a public office occurs by virtue of the constitutional provision against double office holding, such vacancy occurs as of the date of the acceptance of the second office, unaffected by the fact that the person accepting the second office continues to discharge the duties of the office in good faith, since ignorance of the law excuses no man. State ex rel. Atkins v. Fortner, 236 N.C. 264, 72 S.E.2d 594 (1952).

**Unless First Office Is a Federal Office.** — The constitutional inhibition against double office holding is enforced in alternative ways, depending on whether the first office is a State or a federal office. Where one holding a first office under the State violates this section by accepting a second office under either the State or the United States without surrendering the first office, he automatically and instantly vacates the first office, and he does not thereafter act as either a de jure or a de facto officer in performing functions of the first office, because he has neither right nor color of right to it. Where one holding a first office under the United States violates the section by accepting a second office under the State without surrendering the first office, his attempt to qualify for the second office is absolutely void, and he does not act as either a de jure or a de facto officer in performing the functions of the second office, because he has neither right nor color of right to it. Edwards v. Board of Educ., 235 N.C. 345, 70 S.E.2d 170 (1952).

**Where clerk of county recorder's court accepted the office of justice of the peace** without surrendering the first office, he automatically and instantly vacated the first office, and he did not thereafter act as either a de jure or a de facto officer in performing functions of the first office, because he had neither right nor color of right to it. State v. Cook, 273 N.C. 377, 160 S.E.2d 49 (1968).

**The jurisdiction of a judge of a municipal recorder's court** to impose sentence could not be successfully attacked on the ground that at the time the recorder was appointed as such he was mayor of the municipality and that he therefore held two offices in contravention of this section, since even if it was granted that the statute permitting a mayor to be appointed recorder conferred upon the mayor when chosen recorder other than ex officio duties, the acceptance of the office of recorder would vacate the office of mayor, but would not affect the office of recorder. In re Barnes, 212 N.C. 735, 194 S.E. 499 (1938).

**A statute providing that the incumbent of one public office should also fill another** public office is unconstitutional as violating this section, and cannot be upheld as merely affording a choice between the offices so that the acceptance of the second office would ipso facto vacate the first, since incumbency in the first is essential to incumbency in the second. State ex rel. Brigman v. Baley, 213 N.C. 119, 195 S.E. 617 (1938).

**But a statute which creates no new office** and appoints no additional officer, but merely attaches new duties to offices already existing, to be performed by the incumbents therein, does not violate this section. State ex rel. Brigman v. Baley, 213 N.C. 119, 195 S.E. 617 (1938).

Public-Local Laws of 1931, c. 341, providing that the chairmen of certain county boards of Madison County should elect a tax manager for the county, merely imposed additional duties ex officio upon the said chairmen, and did not provide that any one of them should hold two public offices in violation of this section. Freeman v. Board of County Comm'rs, 217 N.C. 209, 7 S.E.2d 354 (1940).

**Delegation of Duties of City Manager.** — A statute which places the affairs of a municipal corporation in the hands of a city council and a city manager and provides that in the event of a vacancy in the office of city manager, by sickness or otherwise, the council may delegate the duties of this office to one of its members, to be performed ex officio as mere auxiliary duties, with such compensation as the council may determine, but with no salary as a member of the council, did not contravene this section. State ex rel. Grimes v. Holmes, 207 N.C. 293, 176 S.E. 746 (1934).

**Appointment of Naval Officer to Office of Zoning Commissioner.** — A naval officer holds office under the United States government, and therefore under the provisions of this section he could not hold the office of zoning commissioner, and was neither a de facto nor a de jure commissioner. Vance S. Harrington & Co. v. Renner, 236 N.C. 321, 72 S.E.2d 838 (1952).

**Cited** in Arnold v. Varnum, 34 N.C. App. 22, 237 S.E.2d 272 (1977); Ratcliff v. County of Buncombe, 759 F.2d 1183 (4th Cir. 1985); Moore v. Knightdale Bd. of Elections, 331 N.C. 1, 413 S.E.2d 541 (1992).

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**Old Department of Mental Health.** — A person could not serve at the same time as a member of the North Carolina Department of Mental Health (now Department of Human Resources) and as a member of a county board of commissioners, as this would have constituted double office holding under former Art. XIV, § 7, Const. 1868. See opinion of Attorney General to Mr. F.P. Bodenheimer, Jr., 40 N.C.A.G. 571 (1969).

**North Carolina Zoological Authority.** — Membership on the Board of Directors of the North Carolina Zoological Authority is a public office. See opinion of Attorney General to Mr. Cecil J. Spears, Member, Board of Town Commissioners of Enfield, 40 N.C.A.G. 589 (1969).

**Regional Housing Authority.** — A county commissioner may not serve as a commissioner of a regional housing authority created under G.S. 157-36 without violating former Art. XIV, § 7, Const. 1868. The positions of county commissioner and commissioner of a regional housing authority are public offices, and therefore, one person may not hold both positions at the same time. See opinion of Attorney General to Mr. E. Bruce Beasley, III, Mid-East Economic Development Commission, 40 N.C.A.G. 580 (1969).

**Tax Lister.** — The mayor of a town may not also serve as county tax lister without violating former Art. XIV, § 7, Const. 1868. The office of mayor is a public office, and the office of tax lister is also a public office, since the tax lister is appointed to a term of office and is required to take an oath of office, and his duties, imposed by statute, involve the exercise of a portion of the sovereign authority of the State. See opinion of Attorney General to Mr. Tom Hanson, Macon County Tax Supervisor, 40 N.C.A.G. 582 (1969).

**Watershed Improvement Commission.** — Members of a watershed improvement commission created pursuant to (see now G.S. 139-4) exercise powers and authorities which involve the exercise of a portion of the sovereign authority of the State and thus would be considered public officers within the meaning of former Art. XIV, § 7, Const. 1868. Furthermore, a member of a school board and a member of a redevelopment commission are public officials. Thus, persons may not serve in either of these offices and as a member of the watershed improvement commission at the same time. See Opinion of Attorney General to Mr. William Clarence Kluttz, Rowan County Attorney, 40 N.C.A.G. 588 (1970).

**Police Officer Holding Position as Elected Officer.** — A person holding an appointive office as a police officer can concurrently hold a position as an elected officer in either State or local government, including as a school board member. See opinion of Attorney General to Captain Bobby Kilgore, Monroe Public Safety Department, 55 N.C.A.G. 34 (1985).

**Service of County Commissioner or Board or Commission.** — Under G.S. 128-1.2, whenever a board of county commissioners appoints one of its own members to another board or commission, the county commissioner so appointed is considered to be serving on such board or commission as a part of his or her office as a county commissioner. See opinion of Attorney General to C. Preston Cornelius, Senior Resident, Superior Court Judge, 60 N.C.A.G. 50 (1990).

**Tribal Chairman.** — The position of Tribal Chairman is neither an elective nor an appointive office subject to the dual office holding prohibitions of the North Carolina Constitution and related statutes. See opinion of Attorney General to The Honorable Ronnie Sutton, N.C. House of Representatives, 2000 N.C. AG LEXIS 6 (11/17/2000).

## Sec. 10. Continuation in office.

In the absence of any contrary provision, all officers in this State, whether appointed or elected, shall hold their positions until other appointments are made or, if the offices are elective, until their successors are chosen and qualified.

**History.** — The provisions of this section are similar to those of Art. XIV, § 5, Const. 1868.

### CASE NOTES

**Cited** in Moore v. Knightdale Bd. of Elections, 331 N.C. 1, 413 S.E.2d 541 (1992).

**Commissioner's Appointment Void Upon Appointment of Successor.** — Panel of commissioners was evenly split and no majority existed because when the opinion and award was filed, a commissioner who concurred in the opinion was not an officer de jure pursuant as the commissioner's term had ended and a successor had been appointed. Therefore, because the commissioner's appointment was void before the opinion and award were entered, and because the commissioner's concurrence in the opinion and award was not the act of a qualified officer — neither de jure nor de facto — the concurrence was a nullity. Baxter v. Danny Nicholson, Inc., 191 N.C. App. 168, 661 S.E.2d 892, 2008 N.C. App. LEXIS 1149 (2008).

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**Where an individual elected as district court judge died prior to certification of the election,** the defeated incumbent judge may remain in office until the end of his term or until his successor is appointed, whichever occurs later. See opinion of Attorney General to The Honorable Christopher W. Bragg, Union County Courthouse, 2004 N.C. AG LEXIS 12 (11/18/04).

**An incumbent sheriff should continue to act as sheriff** during the pendency of an election protest after the expiration of his term until his successor has been qualified. See opinion of Attorney General to Mr. Garris Neil Yarborough, Hoke County Attorney, 1998 N.C.A.G. 53 (12/3/98).

**Environmental Management Commission.** — Members of the Environmental Management Commission continue to hold their positions until other appointments are made. See opinion of Attorney General to Mr. William Holman, Secretary, North Carolina Department of Environment and Natural Resources, 2000 N.C. AG LEXIS 5 (5/9/2000).

# ARTICLE VII

# LOCAL GOVERNMENT

## Section 1. General Assembly to provide for local government.

The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.

The General Assembly shall not incorporate as a city or town, nor shall it authorize to be incorporated as a city or town, any territory lying within one mile of the corporate limits of any other city or town having a population of 5,000 or more according to the most recent decennial census of population taken by order of Congress, or lying within three miles of the corporate limits of any other city or town having a population of 10,000 or more according to the most recent decennial census of population taken by order of Congress, or lying within four miles of the corporate limits of any other city or town having a population of 25,000 or more according to the most recent decennial census of population taken by order of Congress, or lying within five miles of the corporate limits of any other city or town having a population of 50,000 or more according to the most recent decennial census of population taken by order of Congress. Notwithstanding the foregoing limitations, the General Assembly may incorporate a city or town by an act adopted by vote of three-fifths of all the members of each house. (1971, c. 857, s. 1.)

**History.** — The provisions of the first paragraph of this section are similar to those of Art. VIII, § 4, Const. 1868, as amended in 1916.

**Legal Periodicals.** — For article on local legislation in the General Assembly, discussing this section, see 45 N.C.L. Rev. 340 (1967).

For note on the expansion of standing in North Carolina taxpayers' actions, see 15 Wake Forest L. Rev. 126 (1979).

For comment discussing North Carolina's unilateral annexation statutes, see 19 Wake Forest L. Rev. 215 (1983).

For 1984 survey, "Competitive Annexation Among Municipalities: North Carolina Adopts the Prior Jurisdiction Rule," see 63 N.C.L. Rev. 1260 (1985).

For article, "Bargain Basement Annexation: How Municipalities Subvert the Intent of North Carolina Annexation Laws," see 29 N.C. Cent. L.J. 77 (2006).

## CASE NOTES

***Editor's Note.*** *— Some of the cases cited below were decided under former Art. VIII, § 4, Const. 1868, as amended.*

**Counties, cities and towns are governmental agencies of the State,** created by the legislature for administrative purposes, and the legislature retains control and supervision over both classes of municipal corporations, limited only by this section. Town of Saluda v. County of Polk, 207 N.C. 180, 176 S.E. 298 (1934).

Municipal corporations are instrumentalities of the State for the administration of local government. They are created by the General Assembly under the general authority conferred by this section. They have such powers as are expressly conferred by statute and those necessarily implied therefrom. Town of Grimesland v. City of Wash., 234 N.C. 117, 66 S.E.2d 794 (1951).

A municipal corporation, city or town, is an agency created by the State to assist in the civil government of a designated territory. Its charter is the legislative description of the power to be exercised. In re Indian Hills, 280 N.C. 659, 186 S.E.2d 909 (1972).

The counties of North Carolina were created by the General Assembly as governmental agencies of the State. In re Martin, 286 N.C. 66, 209 S.E.2d 766 (1974).

This section gives the General Assembly the authority to provide for the organization and government of counties, including the granting of such powers and duties to the counties as it deems advisable. As an agent of the State, a county has no inherent power, but may exercise only those powers prescribed by statute and those necessarily implied by law. In re Easement of Right of Way, 90 N.C. App. 303, 368 S.E.2d 639 (1988).

**And Derive their Powers Almost Solely from Legislative Enactment.** — Municipal corporations derive their powers almost solely from legislative enactment under this section, and are subject to statutory restrictions and regulations of their taxing power. Purser v. Ledbetter, 227 N.C. 1, 40 S.E.2d 702 (1946).

**Including Power to Tax.** — A sovereign state, as one of its inherent attributes, has the power of taxation, which must be exercised by its legislative branch. The county is not a sovereign and hence does not have the inherent power to levy taxes. A county must derive its taxing power from the State Constitution or from the State's legislative enactments. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

The counties have no inherent taxing power. A county derives its power to tax from the legislature and cannot complain that the enabling legislation is lacking in breadth. In re Martin, 286 N.C. 66, 209 S.E.2d 766 (1974).

This section seems to give a general control to the legislature on the subject of municipal corporations, and the legislature may, under it, restrict the power of taxation by corporations as it may think proper, due regard being had to other parts of the Constitution. Pullen v. Board of Comm'rs, 68 N.C. 451 (1873).

**And Control of Finances.** — The legislature has plenary power to control the finances of the municipal corporations which it creates, and to direct how their revenues shall be applied. Hence it can direct that revenues derived from municipal enterprises shall be applied on outstanding bonds as well as upon bonds to be issued thereafter. George v. City of Asheville, 80 F.2d 50, 103 A.L.R. 568 (4th Cir. 1935).

**Powers of Municipal Corporation.** — A municipal corporation possesses, and may exercise, the following powers, and no others: (1) those granted in express words; (2) those necessarily or fairly implied; and (3) those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. In re Indian Hills, 280 N.C. 659, 186 S.E.2d 909 (1972).

When the state department of transportation filed a condemnation suit against a county, the trial court properly denied the county's motion to dismiss based on sovereign immunity; because under N.C. Const., Art. VII, § 1, a county derives all of its sovereign immunity from the state, its sovereign immunity cannot be superior to that of the state. N.C. DOT v. County of Durham, 181 N.C. App. 346, 638 S.E.2d 577, 2007 N.C. App. LEXIS 78 (2007).

**Doubt as to Power Resolved Against Corporation.** — Any fair, reasonable doubt concerning the existence of power is resolved by the courts against a municipal corporation, and the power is denied. In re Indian Hills, 280 N.C. 659, 186 S.E.2d 909 (1972).

**Authority of Cities, etc., May Be Enlarged, Abridged or Withdrawn.** — The authority of cities and towns as instrumentalities for the administration of local government may be enlarged, abridged or withdrawn entirely at the will or pleasure of the legislature. Town of Murphy v. C.A. Webb & Co., 156 N.C. 402, 72 S.E. 460 (1911); Rhodes v. City of Asheville, 230 N.C. 134, 52 S.E.2d 371, petition for rehearing denied, 230 N.C. 759, 53 S.E.2d 313 (1949).

**Alteration of Charter Not Forbidden.** — This section does not forbid altering or amending charters of cities, towns and incorporated villages or conferring upon municipal corporations additional powers or restricting the powers theretofore vested in them. Holton v. Town of Mocksville, 189 N.C. 144, 126 S.E. 326 (1924). See also, Deese v. Town of Lumberton, 211 N.C. 31, 188 S.E. 857 (1936); Candler v. City of Asheville, 247 N.C. 398, 101 S.E.2d 470 (1958).

General Assembly was acting within its authority when it amended city's charter and extended city council term of office to four years. Crump v. Snead, 134 N.C. App. 353, 517 S.E.2d 384, 1999 N.C. App. LEXIS 760 (1999), cert. denied, 351 N.C. 101, 541 S.E.2d 143 (1999).

**It is for the legislature to decide when it is necessary to pass a restrictive statute.** State v. Irvin, 126 N.C. 989, 35 S.E. 430 (1900).

**Restrictions on Bond Issue.** — The legislature may restrict or limit the power of incorporated towns or cities to tax or contract debts for purposes which fall within the class of necessary expenses, for they are but the State's instrumentalities for the administration of local government; and when this restriction is thus placed upon them, or it is required of them to submit the question of a bond issue to popular vote, and an issue of bonds is made without compliance therewith, the issue is invalid. Town of Murphy v. C.A. Webb & Co., 156 N.C. 402, 72 S.E. 460 (1911).

**Restrictions on Levy of Tax.** — A municipality may not levy a tax without submitting the question to the qualified voters where the legislature by statute requires the consent of such voters. Wadsworth v. City of Concord, 133 N.C. 587, 45 S.E. 948 (1903); Robinson v. City of Goldsboro, 135 N.C. 382, 47 S.E. 462 (1904); Ellison v. Town of Williamston, 152 N.C. 147, 67 S.E. 255 (1910).

**Council Could Not Be Estopped From Terminating Unauthorized Payments Without Notice.** — Where a town's resolution appropriating a certain percentage of its alcoholic beverage control revenue to county school board was outside the authority of the town council, the town council could not be estopped from terminating the unauthorized payments without notice. Watauga County Bd. of Educ. v. Town of Boone, 106 N.C. App. 270, 416 S.E.2d 411 (1992).

**The fixing of boundaries of municipal corporations is a permissible legislative function.** Jones v. Jeanette, 34 N.C. App. 526, 239 S.E.2d 293 (1977).

**The setting up of a municipal corporation by the legislature at any place is left to legislative discretion.** Starmount Co. v. Ohio Sav. Bank & Trust Co., 55 F.2d 649 (4th Cir. 1932).

**Motives of Legislature in Incorporation of Political Subdivisions.** — Ordinarily, the courts have no authority to inquire into the motives of the legislature in the incorporation of political subdivisions. Jones v. Jeanette, 34 N.C. App. 526, 239 S.E.2d 293 (1977).

**Legislative Power to Amend Charter of Municipal Corporation.** — When there is no constitutional limitation to the contrary, the legislature has full power to amend the charter of a municipal corporation at its pleasure, and the amendment takes effect without any acceptance on the part of the municipality. Bethania Town Lot Comm. v. City of Winston-Salem, 126 N.C. App. 783, 486 S.E.2d 729 (1997).

**Annexation Is Within Legislature's Power.** — Annexation by a municipal corporation is a political question which is within the power of the State legislature to regulate. Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820, appeal dismissed and cert. denied, 303 N.C. 710, 283 S.E.2d 136 (1981).

The enlargement of municipal boundaries by the annexation of new territory, and the consequent extension of corporate jurisdiction, including that of levying taxes, are legitimate subjects of legislation. In the absence of constitutional restriction, the extent to which such legislation shall be enacted, both with respect to the terms and circumstances under which the annexation may be had, and the manner in which it may be made, rests entirely in the discretion of the legislature. Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820, appeal dismissed and cert. denied, 303 N.C. 710, 283 S.E.2d 136 (1981).

**But Its Power Is Not Unlimited.** — The power of the legislature to expand the boundaries of cities, towns, or other local units, though great, is not unlimited. Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820, appeal dismissed and cert. denied, 303 N.C. 710, 283 S.E.2d 136 (1981).

**Review of Local Annexation Act.** — A local annexation act is not insulated from judicial review when it is an instrument for circumventing a constitutionally protected right. Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820, appeal dismissed and cert. denied, 303 N.C. 710, 283 S.E.2d 136 (1981).

**Notice of Annexation.** — Notice by publication of a public hearing pursuant to former G.S. 160A-24 did not provide inadequate notice to the parties affected by the annexation in violation of their right to due process, since the General Assembly, under this section, may annex land without notice to anyone. Texfi Indus., Inc. v. City of Fayetteville, 44 N.C. App. 268, 261 S.E.2d 21 (1979), aff'd, 301 N.C. 1, 269 S.E.2d 142 (1980).

**Annexation Provisions Not Invalid as Special Legislation.** — Sections 160A-45 et seq. do not violate N.C. Const., Art. II, § 24, which prohibits the General Assembly from enacting "any local, private, or special act or resolution" in regard to certain enumerated subjects. This constitutional provision does not apply to annexation proceedings by municipalities, since this section authorizes the General Assembly "except as otherwise prohibited by this Constitution" to "give such powers and duties to counties, cities, and towns and other governmental subdivisions as it may deem advisable," and no other provision of the Constitution prohibits the General Assembly from enacting special legislation for the annexation of areas by municipalities. Campbell v. City of Greensboro, 70 N.C. App. 252, 319 S.E.2d 323, cert. denied and appeal dismissed, 312 N.C. 492, 322 S.E.2d 553 (1984).

**Annexation of Land Without Annexing Similar Land.** — It is not a denial of the equal protection of the law for a city to annex land without annexing other land similarly situated. Piedmont Ford Truck Sale, Inc. v. City of Greensboro, 324 N.C. 499, 380 S.E.2d 107 (1989).

**Section Does Not Prohibit Local or Special Acts.** — This section contains no prohibition on the exercise of legislative power, and has in it no declaration that private, local, or special acts shall not be passed relating to the organization of cities and towns, and conferring particular powers, and this omission, when considered in connection with the history of amendments to the Constitution, is fatal to the claim that local or special acts may not be legally enacted, conferring special authority on municipal corporations. In re Annexation Ordinances, 253 N.C. 637, 117 S.E.2d 795 (1961).

**Acts Determining Responsibility for Enforcement of Laws Affecting Health Unconstitutional.** — Inspections pursuant to the State Building Code affect health and sanitation, thus acts that altered the legislative directive of G.S. 160A-411 that the city shall determine who will perform the inspections under the Code were local legislation that shifted responsibility for enforcement of laws affecting the health of the public and were barred under Art. II, § 24 of the Constitution. City of New Bern v. New Bern-Craven County Bd. of Educ., 338 N.C. 430, 450 S.E.2d 735 (1994).

**A school district is not within the purview of this section,** it being not a city, town or incorporated village. Felmet v. Commissioners of Buncombe, 186 N.C. 251, 119 S.E. 353 (1923); Waters v. Board of Comm'rs, 186 N.C. 719, 120 S.E. 450 (1923).

**A county board of elections does not have taxing power.** Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

**Sheriff is Local Officer.** — In the injured party's suit against a sheriff and individual detention officers arising out of a five-day episode in the county detention center where she alleged that they ignored her requests for medical treatment, the trial court properly concluded that the office of North Carolina sheriff was a "person" under 42 U.S.C.S. § 1983 because: (1) the state constitution created the office of sheriff, N.C. Const., Art. VII, § 2, but included that provision within the article governing local governments, along with provisions for counties, cities, towns, and other governmental subdivisions, N.C. Const., Art. VII, § 1; (2) state statutes, including G.S. 17E-1, 160A-288.2, 143-166.50, and 97-2, characterized a sheriff's department as a local governmental entity; (3) there was no contention that the State would be potentially liable for any monetary judgment entered against the sheriff and the detention officers; and (4) the State did not have, with respect to a sheriff, the minimum degree of control required for Eleventh Amendment immunity. Boyd v. Robeson County, — N.C. App. —, 615 S.E.2d 296, 2005 N.C. App. LEXIS 520 (2005), cert. denied, — N.C. —, 615 S.E.2d 866 (2005).

Trial court properly denied summary judgment to sheriff and two detention center officers with regard to a former inmate's suit asserting a violation of her state and federal constitutional rights with regard to allegedly having been denied medical treatment for appendicitis while incarcerated at a county detention center.

The sheriff and the officers were "persons" amendable to suit under 42 U.S.C.S. § 1983 and were not immune since the indifference shown, despite the inmate's repeated complaints of pain, was not protected by qualified immunity. Boyd v. Robeson County, 169 N.C. App. 460, 621 S.E.2d 1, 2005 N.C. App. LEXIS 2352 (2005).

In the State of North Carolina, a sheriff is a person amendable to suit under 42 U.S.C.S. § 1983. Boyd v. Robeson County, 169 N.C. App. 460, 621 S.E.2d 1, 2005 N.C. App. LEXIS 2352 (2005).

**Applied** in Kegley v. City of Fayetteville, 170 N.C. App. 656, 613 S.E.2d 696, 2005 N.C. App. LEXIS 1073 (2005).

**Cited** in State v. Jones, 41 N.C. App. 189, 254 S.E.2d 234 (1979); In re City of Durham Annexation Ordinance Numbered 5991 for Area A, 69 N.C. App. 77, 316 S.E.2d 649 (1984); Piedmont Ford Truck Sales, Inc. v. City of Greensboro, 90 N.C. App. 692, 370 S.E.2d 262 (1988).

## Sec. 2. Sheriffs.

**In each county a Sheriff shall be elected by the qualified voters thereof at the same time and places as members of the General Assembly are elected and shall hold his office for a period of four years, subject to removal for cause as provided by law.**

**Cross References.** — As to sheriffs, see G.S. 162-1 et seq.

**History.** — The provisions of this section are similar to those of Art. VII, § 5, Const. 1868, as amended in 1962.

**Defeated Amendment Proposal.** — An amendment proposed by Session Laws 1985, c. 768, ss. 9.1(2) and (10), and defeated at the primary election held on May 6, 1986, would have amended this section by inserting "except in 1988 at the same time and places as members of the United States House of Representatives are elected" following "General Assembly are enacted," and by adding "except that those elected in 1986 or 1988 shall serve for terms of five years" at the end of the section.

**Legal Periodicals.** — For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2281 (1997).

### CASE NOTES

**Sheriffs Not Entitled to Eleventh Amendment Immunity.** — The Eleventh Amendment of the U.S. Constitution does not bar a suit against a sheriff in his official capacity, because state law treats sheriffs as local officials. Harter v. Vernon, 101 F.3d 334 (4th Cir. 1996), cert. denied, 521 U.S. 1120, 117 S. Ct. 2511, 138 L. Ed. 2d 1014 (1997).

In the injured party's suit against a sheriff and individual detention officers arising out of a five-day episode in the county detention center where she alleged that they ignored her requests for medical treatment, the trial court properly concluded that the office of North Carolina sheriff was a "person" under 42 U.S.C.S. § 1983 because: (1) the state constitution created the office of sheriff, N.C. Const. art. VII, § 2, but included that provision within the article governing local governments, along with provisions for counties, cities, towns, and other governmental subdivisions, N.C. Const. art. VII, § 1; (2) state statutes, including G.S. 17E-1, 160A-288.2, 143-166.50, and 97-2, characterized a sheriff's department as a local governmental entity; (3) there was no contention that the State would be potentially liable for any monetary judgment entered against the sheriff and the detention officers; and (4) the State did not have, with respect to a sheriff, the minimum degree of control required for Eleventh Amendment immunity. Boyd v. Robeson County, — N.C. App. —, 615 S.E.2d 296, 2005 N.C. App. LEXIS 520 (2005), cert. denied, — N.C. —, 615 S.E.2d 866 (2005).

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Trial court properly denied summary judgment to a sheriff and two detention center officers with regard to a former inmate's suit asserting a violation of her state and federal constitutional rights with regard to allegedly having been denied medical treatment for appendicitis while incarcerated at a county detention center. The sheriff and the officers were "persons" amendable to suit under 42 U.S.C.S. § 1983 and were not immune since the indifference shown, despite the inmate's repeated complaints of pain, was not protected by qualified immunity. Boyd v. Robeson County, 169 N.C. App. 460, 621 S.E.2d 1, 2005 N.C. App. LEXIS 2352 (2005).

**A sheriff occupies a constitutional public office,** and takes office, not by contract, but by commission subject to the power of the legislature to fix fees and compensation for which the Constitution does not provide. Borders v. Cline, 212 N.C. 472, 193 S.E. 826 (1937), decided under former Art. IV, § 24, Const. 1868, prior to amendment in 1962.

**Sheriffs Are Local Officers.** — In providing for the organization of local governments, the N.C. Constitution does not make sheriffs state rather than local officers; therefore, Industrial Commission did not have jurisdiction to hear claims of negligence against county sheriffs. Hull v. Oldham, 104 N.C. App. 29, 407 S.E.2d 611, cert. denied, 330 N.C. 441, 412 S.E.2d 72 (1991).

**Deputy Sheriffs.** — While the office of sheriff is provided for by this section, the right of the sheriff to appoint deputies is a common-law right; deputies appointed by the sheriff are public officers, but their duties and authority relate only to ministerial duties imposed by law upon the sheriff, in the performance of which they act for the sheriff in his name and right. Gowens v. Alamance County, 3 S.E.2d 339 (1939), decided under former Art. IV, § 24, Const. 1868, prior to amendment in 1962.

**Cited** in Messick v. Catawba County, 110 N.C. App. 707, 431 S.E.2d 489 (1993); Durham Herald Co. v. County of Durham, 334 N.C. 677, 435 S.E.2d 317 (1993); Braswell v. Ellis, 950 F. Supp. 145 (E.D.N.C. 1995); Harter v. Vernon, 953 F. Supp. 685 (M.D.N.C. 1996); Hubbard v. County of Cumberland, 143 N.C. App. 149, 544 S.E.2d 587, 2001 N.C. App. LEXIS 235 (2001).

### OPINIONS OF ATTORNEY GENERAL

**Confiscated Drugs.** — If federal authorities confiscate drug related property and thereafter return a part of it to local authorities for law enforcement purposes, the North Carolina Constitution and laws do not require these funds to go to the local school board as forfeited property and they may be used by local law enforcement. See opinion of the Attorney General to Mr. Aubrey S. Tomlinson, Jr., Attorney for Franklin County, 58 N.C.A.G. 51 (1988).

## Sec. 3. Merged or consolidated counties.

Any unit of local government formed by the merger or consolidation of a county or counties and the cities and towns therein shall be deemed both a county and a city for the purposes of this Constitution, and may exercise any authority conferred by law on counties, or on cities and towns, or both, as the General Assembly may provide.

**Editor's Note.** — This section is new with the Constitution of 1970.

# ARTICLE VIII

# CORPORATIONS

## Section 1. Corporate charters.

No corporation shall be created, nor shall its charter be extended, altered, or amended by special act, except corporations for charitable, educational, penal, or reformatory purposes that are to be and remain under the patronage and control of the State; but the General Assembly shall provide by general laws for the chartering, organization, and powers of all corporations, and for the amending, extending, and forfeiture of all charters, except those above permitted by special act. All such general acts may be altered from time to time or repealed. The General Assembly may at any time by special act repeal the charter of any corporation.

**History.** — The provisions of this section are similar to those of Art. VIII, § 1, Const. 1868, as amended in 1916.

**Legal Periodicals.** — See 12 N.C.L. Rev. 296 (1934).

For article on local legislation in the General

Assembly, discussing this section, see 45 N.C.L. Rev. 340 (1967).

For a comment on the acquisition, abandonment, and preservation of rail corridors in North Carolina, see 75 N.C.L. Rev. 1989 (1997).

## CASE NOTES

***Editor's Note.** — Most of the cases cited below were decided under former Art. VIII, § 1, Const. 1868, as amended.*

**Purpose of Section.** — The purpose and effect of this section is to enable the State to control, modify or repeal corporate powers, thus avoiding the effect of the doctrine announced in Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 4 L. Ed. 629 (1819); Elizabeth City Water & Power Co. v. City of Elizabeth City, 188 N.C. 278, 124 S.E. 611 (1924). See also, Atlantic & N.C.R.R. v. Dortch, 124 N.C. 663, 33 S.E. 1014 (1899).

**Effect of Section.** — Except for purposes of absolute repeal, which is retained throughout as essential to the proper exercise and enforcement of the police powers of government, and except, also, in the instances expressly designated, this section withdraws from the General Assembly any and all power by special enactments to create, extend, alter, or amend the charter of all private business corporations, and all quasi-public corporations, such as railroads, incorporated turnpike or toll roads, bridge companies, and the like, and also those corporations which while having at times and to some extent powers appertaining to government are in fact and in truth business corporations for the purpose principally of promoting private interest. Watts v. Lenoir & Blowing Rock, Tpk. Co., 181 N.C. 129, 106 S.E. 497 (1921).

**Only "Special Acts" are Prohibited.** — This section only prohibits the enactment of a special act, and an act which relates to all municipal corporations of a county, including cities, towns, townships, and school districts, is not a special act within its meaning and intent. Kornegay v. City of Goldsboro, 180 N.C. 441, 105 S.E. 187 (1920).

**And Prohibition of Special Acts Applies Only to Private Corporations.** — The provisions of this section prohibiting the legislature from creating a corporation or extending, altering or amending its charter by special act has been held to apply only to private or business corporations; and where the legislature by special act amending the charter of a city authorizes it to purchase electricity and resell it to its inhabitants and those within a three-mile zone of the city, the power to sell to such individuals and corporations does not detract from the public service or destroy the public character of the municipality, and where the same power is given the city by general statute also, the exercise of the power thus conferred will not be enjoined. Holmes v. City of Fayetteville, 197 N.C. 740, 150 S.E. 624 (1929), appeal dismissed, 281 U.S. 700, 50 S. Ct. 353, 74 L. Ed. 1126 (1930).

The prohibition contained in this section refers only to private or business corporations, and does not refer to public or quasi-public corporations acting as governmental agencies. Mills v. Board of Comm'rs, 175 N.C. 215, 95 S.E. 481 (1918); Dickson v. Brewer, 180 N.C. 403, 104 S.E. 887 (1920). See Webb v. Port Comm'n, 205 N.C. 663, 172 S.E. 377 (1934); In re Annexation Ordinances, 253 N.C. 637, 117 S.E.2d 795 (1961).

**Authority over Public Corporations, etc.** — This Article and N.C. Const., Art. VII give the legislature complete authority to create, control, and dissolve cities, towns, and other public corporations or governmental agencies. State ex rel. East Lenoir San. Dist. v. City of Lenoir, 249 N.C. 96, 105 S.E.2d 411 (1958).

**Legislature May Create Corporation for Public Purpose.** — The legislative power as to State and political and administrative subdivisions thereof is restrained only by the limitations imposed by the State Constitution and the Constitution of the United States, and there is no constitutional limitation on the power of the General Assembly to create a corporation for a public purpose. Brumley v. Baxter, 225 N.C. 691, 36 S.E.2d 281, 162 A.L.R. 930 (1945).

**Commission created as an agency of the State to provide port facilities** for the commerce of the State in the public interest, and not for private gain, is a public corporation, and the legislature is not prohibited from creating such corporation by this section, nor is the act creating it a special act within the meaning of this section, and the commission may lawfully exercise all powers conferred upon it in order to perform its duties as prescribed by the act. Webb v. Port Comm'n, 205 N.C. 663, 172 S.E. 377 (1934).

**Right of Alteration a Part of Every Charter.** — The provisions of this section, affecting the organization of corporations, and specifically providing that all such laws may be altered from time to time or repealed, enters into every charter taken out or corporation formed thereunder, and any such corporation may not complain when a statutory repeal or amendment has been made, on the ground that it works a hardship on it or impairs the value of its property, unless vested rights have been acquired by it which have been impaired or destroyed by the repealing or amendatory act complained of. State v. Cantwell, 142 N.C. 604, 55 S.E. 820 (1906); Yadkin River Power Co. v. Whitney Co., 150 N.C. 31, 63 S.E. 188 (1908), appeal dismissed, 214 U.S. 503, 29 S. Ct. 702, 53 L. Ed. 1061 (1909); Elizabeth City Water & Power Co. v. City of Elizabeth City, 188 N.C. 278, 124 S.E. 611 (1924).

**Power to Extinguish Corporations.** — The General Assembly may, at its discretion, abolish municipal as well as other corporations, because they are all alike creatures of its will, and exist only at its pleasure. Ward v. Elizabeth City, 121 N.C. 1, 27 S.E. 993 (1897).

**Effect of Dissolution.** — Upon the dissolution or extinction of a corporation under this section for any cause, real property conveyed to it in fee does not revert to the original grantors or their heirs, and its personal property does not escheat to the State; and this is so whether or not the duration of the corporation was limited by its charter or general statute. Wilson v. Leary, 120 N.C. 90, 26 S.E. 630 (1897), overruling Fox v. Horah, 36 N.C. 358 (1841).

**Where the legislature deprived board of township trustees of its existence** as a municipal corporation, the right to sue and be sued were likewise extinguished, and hence it could not thereafter be a party to a suit. Wallace v. Board of Trustees, 84 N.C. 164 (1881).

**Cited** in Sides v. Cabarrus Mem. Hosp., 22 N.C. App. 117, 205 S.E.2d 784 (1974); In re City of Durham Annexation Ordinance Numbered 5991 for Area A, 69 N.C. App. 77, 316 S.E.2d 649 (1984).

## Sec. 2. Corporations defined.

The term "corporation" as used in this Section shall be construed to include all associations and joint-stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships. All corporations shall have the right to sue and shall be subject to be sued in all courts, in like cases as natural persons.

**History.** — The provisions of this section are similar to those of Art. VIII, § 3, Const. 1868, as amended in 1916.

# ARTICLE IX

# EDUCATION

## Section 1. Education encouraged.

Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged.

**History.** — The provisions of this section are similar to those of Art. IX, § 1, Const. 1868.

**Legal Periodicals.** — For comment on the public purpose doctrine, see 3 Wake Forest Intra. L. Rev. 37 (1967).

For comment, "The State and Sectarian Education: Regulation to Deregulation," see 1980 Duke L.J. 801.

For note, "Delconte v. State: Some Thoughts on Home Education," see 64 N.C.L. Rev. 1302 (1986).

For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

### CASE NOTES

***Editor's Note.*** — *Some of the cases cited below were decided under former Art. IX, § 1, Const. 1868.*

**Education is a governmental function so fundamental** in this state that our constitution contains a separate article entitled "Education." Rowan County Bd. of Educ. v. United States Gypsum Co., 332 N.C. 1, 418 S.E.2d 648 (1992).

**This and the following sections are mandatory** in their provisions. Fuller v. Lockhart, 209 N.C. 61, 182 S.E. 733 (1935); Mebane Graded Sch. Dist. v. County of Alamance, 211 N.C. 213, 189 S.E. 873 (1937). See also, Elliott

v. State Bd. of Equalization, 203 N.C. 749, 166 S.E. 918 (1932).

The duty imposed on the State under this Article is mandatory. Harris v. Board of Comm'rs, 274 N.C. 343, 163 S.E.2d 387 (1968).

**Provision for Education Is for a Public Purpose.** — The education of residents of the State is a recognized object of State government. Hence, provision therefor is for a public purpose. State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970).

**Methods Are to Be Determined by General Assembly.** — Subject to constitutional limitations, methods to facilitate and achieve the public purpose of providing for the education or training of residents of this State in institutions of higher education of post-secondary schools are for determination by the General Assembly. State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970).

**Cited** in Swann v. Charlotte-Mecklenburg Bd. of Educ., 318 F. Supp. 786 (W.D.N.C. 1970); Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972); Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 55 N.C. App. 134, 285 S.E.2d 110 (1981); Faulkner v. New Bern-Craven County Bd. of Educ., 311 N.C. 42, 316 S.E.2d 281 (1984); Guilford County Bd. of Educ. v. Guilford County Bd. of Elections, 110 N.C. App. 506, 430 S.E.2d 681 (1993).

## Sec. 2. Uniform system of schools.

(1) *General and uniform system: term.* The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.

(2) *Local responsibility.* The General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate. The governing boards of units of local government with financial responsibility for public education may use local revenues to add to or supplement any public school or post-secondary school program.

**Cross References.** — As to establishment of a uniform school system, see G.S. 115C-1.

**History.** — The provisions of subsection (1) of this section are similar to those of Art. IX, § 2, Const. 1868, as amended by the Convention of 1875. Subsection (2) of this section corresponds to Art. IX, § 3, Const. 1868. That section, as amended in 1918, provided that each county should be divided into districts, in which one or more public schools should be maintained at least six months in every year, and made county commissioners liable to indictment for failure to comply with the section.

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1116 (1981).

For survey of 1981 constitutional law, see 60 N.C.L. Rev. 1272 (1982).

For note, "State v. Whittle Communications: Allowing Local School Boards to Turn on 'Channel One'," see 70 N.C.L. Rev. 1929 (1992).

For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

For note on Leandro v. State, 346 N.C. 336, 488 S.E.2d 249 (1997), annotated under this section, see 76 N.C.L. Rev. 1481 (1998).

For article, "Leandro v. State and the Constitutional Limitation on School Suspensions and Expulsions in North Carolina" see 83 N.C. L. Rev. 1507 (2005).

### CASE NOTES

***Editor's Note.*** — *Some of the cases cited below were decided under former Art. IX, §§ 2 and 3, Const. 1868, before and after amendment.*

**Public School System Established.** — The Constitution establishes the public school system, and the General Assembly provides for it, by its own taxing power, and by the taxing power of the counties, and the State Board of Education, by the aid of school committees, manages it. It is to be a "system," it is to be "general," and it is to be "uniform." It is not to be subject to the caprices of localities, but every locality, yea, every child, is to have the same advantage and be subject to the same rules and regulations. Lane v. Stanly, 65 N.C. 153 (1871).

This section contemplates that the General Assembly shall provide a State system of public schools to the end that every child, without regard to the county in which such child resides, shall have an opportunity to attend a school in which standards set up by the State are maintained and wherein tuition shall be free of charge. Marshburn v. Brown, 210 N.C. 331, 186 S.E. 265 (1936); Constantian v. Anson County, 244 N.C. 221, 93 S.E.2d 163 (1956).

The provisions of this section and of N.C. Const., Art. I, § 15, with the activating statutes, embody mandates for the establishment of free public schools in North Carolina, the untrammeled privilege of education for all students, and the duty of the State to maintain and guard that right, while guaranteeing equal opportunities to all students. Webster v. Perry, 512 F.2d 612 (4th Cir. 1975).

**Meaning of "Uniform".** — The requirement of this section that the public school system shall be uniform by legislative authority relates to the uniformity of the "system," and not to the uniformity of the class or kind of the "schools"; thus qualifying the word "system," it is sufficiently complied with where, by statute or authorized regulation of the public school authorities, provision is made for establishment of schools of like kind throughout all sections of the State and available to all of the school population of the territories contributing to their support. Board of Educ. v. Board of County Comm'rs, 174 N.C. 469, 93 S.E. 1001 (1917).

**Intent.** — By mandating equal opportunities for all students, the framers of the Constitution and the voters that adopted it were emphasizing that the days of "separate but equal" education in this State were over, and that the people of this State were committed to providing all students with equal access to full participation in public schools, regardless of race or other classification. Britt v. North Carolina State Bd. of Educ., 86 N.C. App. 282, 357 S.E.2d 432, appeal dismissed, 320 N.C. 790, 361 S.E.2d 71 (1987).

**Equal access to participation in the public school system is a fundamental right** guaranteed by the State Constitution and protected by considerations of procedural due process. Sneed v. Greensboro City Bd. of Educ., 299 N.C. 609, 264 S.E.2d 106 (1980).

The fundamental right that is guaranteed by the Constitution is equal access to public schools; that is, every child has a fundamental right to receive an education in public schools. Britt v. North Carolina State Bd. of Educ., 86 N.C. App. 282, 357 S.E.2d 432, appeal dismissed, 320 N.C. 790, 361 S.E.2d 71 (1987).

**The right to education provided in the state constitution is a right to a sound basic education.** An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate. Leandro v. State, 346 N.C. 336, 488 S.E.2d 249, 1996 N.C. App. LEXIS 201 (1997).

**Sound Basic Education.** — Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools. Leandro v. State, 346 N.C. 336, 488 S.E.2d 249, 1996 N.C. App. LEXIS 201 (1997).

For purposes of our Constitution, a sound basic education will provide the student with at least: (1) sufficient ability to read, write, and speak English and a sufficient knowledge of fundamental math and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history and basic economic and political systems to enable the student to make informed choices regarding personal issues or issues that affect the community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; (4) and sufficient academic and social skills to enable the student to compete on an equal basis with others in further formal education or gainful employment. Leandro v. State, 346 N.C. 336, 488 S.E.2d 249, 1996 N.C. App. LEXIS 201 (1997).

**Substantially Equal Funding Not Required.** — Although the State Constitution requires that access to a sound basic education be provided equally in every school district, the equal opportunities clause of Article IX, Section 2(1) does not require substantially equal funding or educational advantages in all school districts. Leandro v. State, 346 N.C. 336, 488 S.E.2d 249, 1996 N.C. App. LEXIS 201 (1997).

The equal opportunities clause of Article IX, Section 2(1) does not require substantially equal funding or educational advantages in all school districts. Banks v. County of Buncombe, 128 N.C. App. 214, 494 S.E.2d 791 (1998), aff'd, 348 N.C. 687, 500 S.E.2d 666 (1998).

**Creation of Supplemental Funding Programs Allowed.** — Because under subsection (1) of this Section the General Assembly has the duty of providing the children of every school district with access to a sound basic education, it has inherent power to do those things reasonably related such as creating a supplemental state funding program to provide additional funds to poor districts. Leandro v. State, 346 N.C. 336, 488 S.E.2d 249, 1996 N.C. App. LEXIS 201 (1997).

**A student's right to an education may be constitutionally denied when** it is outweighed by the school's interest in protecting other students, teachers, and school property, and in preventing the disruption of the educational system. In re Jackson, 84 N.C. App. 167, 352 S.E.2d 449 (1987).

As a general rule, a student may be constitutionally suspended or expelled for misconduct, whenever the conduct is of a type the school may legitimately prohibit, and procedural due process is provided. In re Jackson, 84 N.C. App. 167, 352 S.E.2d 449 (1987).

**State Has Responsibility for Overseeing Public Schools.** — Under the Constitution, the State is given responsibility for overseeing the public schools of this State in order to ensure that every student in the State receives the education to which he or she is entitled. Britt v. North Carolina State Bd. of Educ., 86 N.C. App. 282, 357 S.E.2d 432, appeal dismissed, 320 N.C. 790, 361 S.E.2d 71 (1987).

**This section is mandatory and may not be disregarded** either by the legislature or by officials charged with the duty of administering the law. Blue v. Durham Pub. Sch. Dist., 95 F. Supp. 441 (M.D.N.C. 1951).

The provisions of this section and N.C. Const., Art. IX, § 1 of this Article are mandatory and require that the legislature provide by taxation and otherwise for a general and uniform system of public education, free of charge, to all of the children of the State and for the continuance of the school term in the various districts for at least six months (now nine months) in each and every year. Lacy v. Fidelity Bank, 183 N.C. 373, 111 S.E. 612 (1922), aff'd, 264 U.S. 171, 44 S. Ct. 280, 60 L. Ed. 623 (1924). See also, Collie v. Commissioners of Franklin County, 145 N.C. 170, 59 S.E. 44 (1907); Mebane Graded Sch. Dist. v. County of Alamance, 211 N.C. 213, 189 S.E. 873 (1937).

It is the duty of the State to provide a general and uniform State system of public schools of at least six months (now nine months) in every year, wherein tuition shall be free of charge to all the children of the State. It is a necessary expense, and a vote of the people is not required to make effective these and other constitutional provisions in relation to the public school system of the State. Mebane Graded Sch. Dist. v. County of Alamance, 211 N.C. 213, 189 S.E. 873 (1937). See also, Fuller v. Lockhart, 209 N.C. 61, 182 S.E. 733 (1935).

The operation of the public schools as required by this Article is a "necessary expense" not requiring a vote of the electorate under N.C. Const., Art. V, §§ 2 and 4. Yoder v. Board of Comm'rs, 7 N.C. App. 712, 173 S.E.2d 529 (1970).

**But Statute May Provide Mode of Performance.** — This section is mandatory, but the mode of performance is prescribed by statute. City of Hickory v. Catawba County, 206 N.C. 165, 173 S.E. 56 (1934).

**As it is a legislative function to formulate the means of carrying out the provisions of this section.** Wilkinson v. Board of Educ., 199 N.C. 669, 155 S.E. 562 (1930).

**Establishment of School System Is Province of Legislature.** — It is the province of the General Assembly, and not of the State Board of Education, to establish a uniform system of public schools. Board of Educ. v. State Bd. of Educ., 114 N.C. 313, 19 S.E. 277 (1894). See also, Bridges v. City of Charlotte, 221 N.C. 472, 20 S.E.2d 825 (1942).

The establishment and maintenance of a general and uniform system of public schools is upon and exclusively within the province of the General Assembly. Moore v. Board of Educ., 212 N.C. 499, 193 S.E. 732 (1937).

The establishment and operation of the public school system is under the control of the legislative branch of the government, subject only to pertinent constitutional provisions as to uniformity and length of term. Coggins v. Board of Educ., 223 N.C. 763, 28 S.E.2d 527 (1944).

**Instructional Service and Facilities Within Constitutional Mandate.** — The mandate of this Article carries with it not merely the bare necessity of instructional service, but all facilities reasonably necessary to accomplish this main purpose. Harris v. Board of Comm'rs, 1 N.C. App. 258, 161 S.E.2d 213, aff'd, 274 N.C. 343, 163 S.E.2d 387 (1968).

Maintenance of the public schools and the furnishing of those things which are reasonably essential to that end are within the mandatory provision of this Article. Harris v. Board of Comm'rs, 1 N.C. App. 258, 161 S.E.2d 213, aff'd, 274 N.C. 343, 163 S.E.2d 387 (1968).

**Sites, Buildings and Equipment Necessary.** — Sites, buildings, and equipment acquired, constructed, and used by a school district were deemed reasonably essential and necessary for the conduct and operation of the required school term at the time the said sites, buildings, and equipment were acquired and constructed. Mebane Graded Sch. Dist. v. County of Alamance, 211 N.C. 213, 189 S.E. 873 (1937).

**Constitution Does Not Prohibit Charging Financially Able Persons for Supplies and Materials.** — Requirement of administrative boards of certain school districts that those pupils or their parents who are financially able to do so furnish supplies and materials for the personal use of such students does not violate the mandate of subsection (1) of this section. Nor is there any constitutional impediment to the charging of modest, reasonable fees by individual school boards to support the purchase of supplementary supplies and materials for use by or on behalf of students. Sneed v. Greensboro City Bd. of Educ., 299 N.C. 609, 264 S.E.2d 106 (1980).

**But fee waiver policy adopted by city board of education was unconstitutional** where it failed to establish a mechanism by which the schools would affirmatively notify students and their parents of the availability of a waiver or reduction of the fee or by which the students or parents themselves might apply for a partial or complete exemption from the fee requirements, since the waiver policy did not fairly guarantee to low income and indigent students their right of equal access to the educational opportunities available at their schools and did not accord procedural due process to such students. Sneed v. Greensboro City Bd. of Educ., 299 N.C. 609, 264 S.E.2d 106 (1980).

**No Maximum Limitation on School Term.** — The mandatory provision of this section to the effect that one or more public schools shall be maintained at least six months (now nine months) in every year, wherein tuition shall be free of charge to children of the State, is not a limitation as to the length of the school term; it is the minimum required by the Constitution. Harris v. Board of Comm'rs, 274 N.C. 343, 163 S.E.2d 387 (1968).

This section, which requires a public school system of the State to have at least six-months (now nine-months) terms in each year, leaves it to the discretionary power of the legislature to fix terms in excess of that period. Frazier v. Board of Comm'rs, 194 N.C. 49, 138 S.E. 433 (1927).

G.S. 115C-1, especially as a codification of N.C. Const., Art. IX, § 2(1), can be read as setting a floor for the quantum of education required. Any other construction of the statute would place G.S. 115C-1 in conflict with G.S. 115C-84.2(a)(1)'s requirement that a school calendar include a minimum of 180 days and 1,000 hours of instruction covering at least 9 calendar months. Wake Cares, Inc. v. Wake County Bd. of Educ., 190 N.C. App. 1, 660 S.E.2d 217, 2008 N.C. App. LEXIS 872 (2008), aff'd 363 N.C. 165, 675 S.E.2d 345 (2009).

G.S. 115C-1 does not limit the authority of a county board of education to assign students to year-round schools because G.S. 115C-1, consistent with the purpose of the constitutional provision it was designed to implement, N.C. Const., Art. IX, § 2, does not mandate equal access to a school term of nine consecutive months but rather refers to the minimum quantum of educational instruction required; G.S. 115C-1 merely codifies the State's constitutional requirement of a general and uniform system of free public schools, which shall be maintained at least nine months in every year, N.C. Const., Art. IX, § 2, and while the educational opportunities available to children attending year-round schools may differ from those available to pupils at traditional schools, these differences do not remove year-round calendar schools from the "uniform system" of public schools. Wake Cares, Inc. v. Wake County Bd. of Educ., 363 N.C. 165, 675 S.E.2d 345, 2009 N.C. LEXIS 351 (2009).

**Contract for Current Affairs Video Not Unconstitutional.** — A local school board's contract with the developer of a short current affairs video did not violate this section; students were not required to watch the program and therefore were not being made to pay for the contract with the time they spent watching it. State v. Whittle Communications, 328 N.C. 456, 402 S.E.2d 556 (1991).

**Exit Tuition Fee for Transfer.** — County Board of Education could not require the payment of an exit tuition fee as a condition to approving the transfer of a county resident student to a school system in a different county, as the exit tuition fee is not provided for by the constitution and statutes of this State. Streeter v. Greene County Bd. of Educ., 115 N.C. App. 452, 446 S.E.2d 107 (1994).

**Maintenance of Day-Care Program in Elementary School.** — A local school board permitting a day-care program for "latch key" children to be operated in an elementary school is not in violation of this section. Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 55 N.C. App. 134, 285 S.E.2d 110 (1981), appeal dismissed and cert. denied, 305 N.C. 300, 291 S.E.2d 150 (1982).

The legislature may constitutionally delegate to the school board the power or authority to maintain a day-care program. Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 55 N.C. App. 134, 285 S.E.2d 110 (1981), appeal dismissed and cert. denied, 305 N.C. 300, 291 S.E.2d 150 (1982).

**Tuition paid by students enrolled in day-care program** is not violative of this section where the tuition is for a supplemental program, not for the students' basic education. Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 55 N.C. App. 134, 285 S.E.2d 110 (1981), appeal dismissed and cert. denied, 305 N.C. 300, 291 S.E.2d 150 (1982).

**The financing of the public school system of the State is in the discretion of the General Assembly** by appropriate legislation, either by State appropriation or through the county acting as an administrative agency of the State. Mebane Graded Sch. Dist. v. County of Alamance, 211 N.C. 213, 189 S.E. 873 (1937).

**Distribution of Funds.** — All of the funds raised in the State for common school purposes should be distributed per capita among the beneficiaries and not be retained in the counties where they are raised. Board of Educ. v. State Bd. of Educ., 114 N.C. 313, 19 S.E. 277 (1894); Board of School Comm'rs v. Mecklenburg Bd. of Educ., 169 N.C. 196, 85 S.E. 138 (1915).

In the distribution of the funds raised for common school purposes, the General Assembly may not discriminate in favor or to the prejudice of either the white or black race. Hooker v. Town of Greenville, 130 N.C. 472, 42 S.E. 141 (1902).

Action for declaratory and injunctive relief brought by minors who were, or would be in the future, enrolled in public schools in the county, and their parents or legal guardians, alleging that the present statutory system of financing public schools in this State resulted in inequities in educational programs and facilities between the public schools within that county, which had a relatively low tax base from which to draw funds, and those in other counties with relatively high tax bases, and that the operation of five separate school systems in that county prohibited effective use of facilities and staff and promoted inequitable use of state and local funds, thus depriving them of equal opportunity to a free public school education in violation of subsection (1) of this section, and N.C. Const., Art. I, §§ 1, 15 and 19, failed to allege facts entitling them to relief or conferring jurisdiction on the courts of this State. Britt v. North Carolina State Bd. of Educ., 86 N.C. App. 282, 357 S.E.2d 432, appeal dismissed, 320 N.C. 790, 361 S.E.2d 71 (1987).

**Counties May Be Directed to Provide Funds.** — It is within the power of the General Assembly to authorize and direct the counties of the State as administrative units or governmental agencies to provide the necessary funds by taxation or otherwise. Harrell v. Board of Comm'rs, 206 N.C. 225, 173 S.E. 614 (1934).

Superior court had jurisdiction to adjudicate a budgetary dispute between a county board of education and a board of county commissioners because the board of county commissioners was required to provide funding to the board of education and upon disagreement as to sufficient funding the board of education was authorized pursuant to G.S. 115C-431(c), which was enacted pursuant to N.C. Const., Art. IX, § 2, to file an action against the board of county commissioners. Beaufort County Bd. of Educ. v. Beaufort County Bd. of Comm'rs, 188 N.C. App. 399, 656 S.E.2d 296, 2008 N.C. App. LEXIS 230 (2008).

**For Programs Proposed by Board of Education.** — The General Assembly has not delegated to board of county commissioners the power to initiate and fund their own programs for the public schools; rather, county commissioners are delegated the power to fund only those school-related programs proposed by the board of education. Hughey v. Cloninger, 297 N.C. 86, 253 S.E.2d 898 (1979).

**Counties May Act as Agents of State.** — The Constitution requires the General Assembly to provide for a general and uniform system of public instruction. In fulfilling this purpose, the General Assembly may act through the agency of the county. When the county acts as agent of the State in carrying out legislative enactments, its actions fall within the authority granted by this section. Benvenue Parent-Teacher Ass'n v. Nash County Bd. of Educ., 4 N.C. App. 617, 167 S.E.2d 538, appeal dismissed, 275 N.C. 675, 170 S.E.2d 473 (1969).

A county is an administrative unit of the State in our statewide public school system, and a statute requiring a county to maintain at least a six-months (now nine-months) school term in each of its school districts and to provide the necessary funds therefor by taxation or otherwise is valid. Evans v. Mecklenburg County, 205 N.C. 560, 172 S.E. 323 (1934).

**A county board of education has the constitutional obligation to correct educational disparities in school facilities** between schools previously maintained for black students and schools previously maintained for white students, and to afford all students of all races in all schools equal educational opportunities. Coppedge v. Franklin County Bd. of Educ., 273 F. Supp. 289 (E.D.N.C. 1967), aff'd, 394 F.2d 410 (4th Cir. 1968).

**Consolidation Upheld.** — Act to consolidate existing school administrative units did not violate subdivision (1) of this section of the Constitution. Guilford County Bd. of Educ. v. Guilford County Bd. of Elections, 110 N.C. App. 506, 430 S.E.2d 681 (1993).

**Minimum funding requirement of act to consolidate existing school administrative units** did not violate subsection (2) of this section. Guilford County Bd. of Educ. v. Guilford County Bd. of Elections, 110 N.C. App. 506, 430 S.E.2d 681 (1993).

**Levy of County Tax to Supplement Teachers' Salaries.** — In levying an additional tax for the purpose of supplementing teachers' salaries pursuant to former G.S. 115-80(a), the board of county commissioners acted as an agency of the State under a delegation of authority from the General Assembly to carry out the duty imposed upon it by this section to maintain a system of public schools, and there was no requirement that such levy be submitted to a vote of the people. Harris v. Board of Comm'rs, 1 N.C. App. 258, 161 S.E.2d 213, aff'd, 274 N.C. 343, 163 S.E.2d 387 (1968).

**Tax Levy for County School Capital Reserve Fund.** — Former G.S. 115-80.1, authorizing the county board of commissioners to levy an ad valorem tax for a county school capital reserve fund to be used for the purpose of anticipating school capital outlays, was a valid exercise of legislative authority; the creation of such fund did not require a vote of the people. Yoder v. Board of Comm'rs, 7 N.C. App. 712, 173 S.E.2d 529 (1970).

**As to expenditure of funds by county for operation of a technical institute** for adult vocational and general educational training, see Benvenue Parent-Teacher Ass'n v. Nash County Bd. of Educ., 4 N.C. App. 617, 167 S.E.2d 538, appeal dismissed, 275 N.C. 675, 170 S.E.2d 473 (1969).

**As to county's obligation in relation to tax limitation provisions of Art. V, § 1, Const. 1868,** see Board of Educ. v. Board of Comm'rs, 111 N.C. 578, 16 S.E. 621 (1892);

Board of Educ. v. Board of County Comm'rs, 174 N.C. 469, 93 S.E. 1001 (1917); Harris v. Board of Comm'rs, 274 N.C. 343, 163 S.E.2d 387 (1968).

**Bond Issue for Student Loans.** — Where bond proceeds are to be used solely to make loans to meritorious North Carolinians of slender means and to thereby minimize the number of qualified persons whose education or training is interrupted or abandoned for lack of funds, the bond proceeds are for a public purpose. State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970).

It is expected that a student loan will inure to the private benefit of the person who obtains it. It is equally true that the education provided throughout the entire school system is intended to inure to the benefit of the individual who obtains it. However, the fact that the individual obtains a private benefit cannot be considered sufficient ground to defeat the execution of the paramount public purpose of encouraging education. State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970).

**Exemption of school bonds from taxation is valid.** County of Mecklenburg v. Piedmont Fire Ins. Co., 210 N.C. 171, 185 S.E. 654 (1936).

**Assumption of Indebtedness of School District.** — When necessary to maintain the term of public schools required by the Constitution, it is within the legislative authority in establishing its statewide system to assume an indebtedness of a school district therefor, including the cost of necessary buildings, and direct that it be provided for by the respective counties as administrative units of the public school system of the State. Lovelace v. Pratt, 187 N.C. 686, 122 S.E. 661 (1924).

**As to mandamus to compel the assumption by a county of indebtedness incurred by school districts** for the erection and equipment of school buildings necessary to the constitutional school term, see City of Hickory v. Catawba County, 206 N.C. 165, 173 S.E. 56 (1934).

**As to mandamus to compel county commissioners to maintain schools,** see County Bd. of Educ. v. Board of Comm'rs, 150 N.C. 116, 63 S.E. 724 (1909); City of Hickory v. Catawba County, 206 N.C. 165, 173 S.E. 56 (1934); Mebane Graded Sch. Dist. v. County of Alamance, 211 N.C. 213, 189 S.E. 873 (1937).

**As to redistricting for school purposes,** see Moore v. Board of Educ., 212 N.C. 499, 193 S.E. 732 (1937).

**Entitlement of Students Expelled under Former § 115-147 to Reinstatement or Equivalent.** — Under the North Carolina Constitution and the implementing statute, students expelled from school pursuant to the authority of former G.S. 115-147 might be entitled to either reinstatement or to equivalent free educational opportunities in a more suitable environment. Webster v. Perry, 367 F. Supp. 666 (M.D.N.C. 1973), vacated on other grounds, 417 U.S. 963, 94 S. Ct. 3166, 41 L. Ed. 2d 1136 (1974), modified, 512 F.2d 612 (4th Cir. 1975).

**Charlotte-Mecklenburg Schools Ordered to Desegregate.** — See Swann v. Charlotte-Mecklenburg Bd. of Educ., 318 F. Supp. 786 (W.D.N.C. 1970), aff'd in part, 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971).

**Cited** in Moore v. Wykle, 107 N.C. App. 120, 419 S.E.2d 164; Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972); Wilson County Bd. of Educ. v. Wilson County Bd. of Comm'rs, 26 N.C. App. 114, 215 S.E.2d 412 (1975); Rowan County Bd. of Educ. v. United States Gypsum Co., 332 N.C. 1, 418 S.E.2d 648 (1992); Cash v. Granville County Bd. of Educ., — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 4852 (E.D.N.C. Mar. 8, 2000); Royal v. State, 153 N.C. App. 495, 570 S.E.2d 738, 2002 N.C. App. LEXIS 1167 (2002); Durham Land Owners Ass'n v. County of Durham, 177 N.C. App. 629, 630 S.E.2d 200, 2006 N.C. App. LEXIS 1187 (2006); Copper v. Denlinger, — N.C. App. —, 667 S.E.2d 470, 2008 N.C. App. LEXIS 1817 (2008).

### OPINIONS OF ATTORNEY GENERAL

**As to the rights of a student to attend the school system in which he, his parents or legal guardian are domiciled,** and the duty and authority of local boards of education concerning the enrollment of students who are and are not domiciled in their school systems, see opinion of Attorney General to Mr. C. Wade Mobley, Superintendent, Rowan County Schools, 55 N.C.A.G. 61 (1985).

## Sec. 3. School attendance.

The General Assembly shall provide that every child of appropriate age and of sufficient mental and physical ability shall attend the public schools, unless educated by other means.

**History.** — The provisions of this section are similar to those of Art. IX, § 11, Const. 1868, as amended in 1942.

**Legal Periodicals.** — For comment on state regulation of private religious schools, see 16 Wake Forest L. Rev. 405 (1980).

For note, "Delconte v. State: Some Thoughts on Home Education," see 64 N.C.L. Rev. 1302 (1986).

For comment, "The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools," see 74 N.C.L. Rev. 1913 (1996).

CASE NOTES

**Right to Education.** — The Constitution of North Carolina treats education as the right of every child of "sufficient physical and mental ability." Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972).

**"Educated by other means".** — The North Carolina Constitution requires the General Assembly to permit children of this State to be "educated by other means" than in the public schools. Delconte v. State, 313 N.C. 384, 329 S.E.2d 636 (1985).

## Sec. 4. State Board of Education.

(1) *Board.* The State Board of Education shall consist of the Lieutenant Governor, the Treasurer, and eleven members appointed by the Governor, subject to confirmation by the General Assembly in joint session. The General Assembly shall divide the State into eight educational districts. Of the appointive members of the Board, one shall be appointed from each of the eight educational districts and three shall be appointed from the State at large. Appointments shall be for overlapping terms of eight years. Appointments to fill vacancies shall be made by the Governor for the unexpired terms and shall not be subject to confirmation.

(2) *Superintendent of Public Instruction.* The Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education.

**Cross References.** — As to the Superintendent of Public Instruction, see G.S. 115C-18 et seq.

**History.** — The provisions of this section are similar to those of Art. IX, § 8, Const. 1868, as amended in 1942 and 1944.

**Legal Periodicals.** — For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

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**Duty to End Segregation in Schools.** — The State Board of Education has an affirmative duty to exercise its authority to the end that school segregation be eliminated. Godwin v. Johnston County Bd. of Educ., 301 F. Supp. 1339 (E.D.N.C. 1969), decided under former Art. IX, § 8, Const. 1868, as amended.

The State's duty to effect a transition from the dual system of schools formerly imposed by the Constitution and laws of the State of North Carolina to a unitary nonracial school system falls not only upon the local school boards, but also upon the State Board of Education and the State Superintendent of Public Instruction. Godwin v. Johnston County Bd. of Educ., 301 F. Supp. 1339 (E.D.N.C. 1969), decided under former Art. IX, § 8, Const. 1868, as amended.

**Cited** in Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971); Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 55 N.C. App. 134, 285 S.E.2d 110 (1981).

## Sec. 5. Powers and duties of Board.

The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

**History.** — The provisions of this section are similar to those of Art. IX, § 9, Const. 1868, as amended in 1942.

**Legal Periodicals.** — For comment on state regulation of private religious schools, see 16 Wake Forest L. Rev. 405 (1980).

For article, "The Pearl in the Oyster: The Public Trust Doctrine in North Carolina," see 12 Campbell L. Rev. 23 (1989).

For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

## CASE NOTES

**State May Regulate Private Schools.** — The State has the power and authority to establish minimum standards for, and to regulate in a reasonable manner, private schools giving instruction to children of compulsory school age. This is necessarily true because such schools affect the public school system. In this connection it has authority, among other things, to inspect, supervise, and examine such schools and their teachers and pupils, and to require that all children of proper age attend some school, that teachers be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship be taught, and that nothing be taught that is manifestly inimical to the public welfare. State v. Williams, 253 N.C. 337, 117 S.E.2d 444 (1960), decided under former Art. IX, § 9, Const. 1868, as amended.

**As Exercise of Police Power.** — The constitutional authority of the State Board of Education to make regulations for and supervise and administer schools is confined to public schools and activities substantially affecting public schools and the public school system. It may have and exert only such authority in the supervision and control of private schools and their agents and representatives as is conferred by the General Assembly in the proper exercise of the police power of the State. State v. Williams, 253 N.C. 337, 117 S.E.2d 444 (1960), decided under former Art. IX, § 9, Const. 1868, as amended.

**But Must Not Be Arbitrary.** — While the legislature, under the police power, may regulate education in many respects in private schools, the exercise of such power of regulation must not be arbitrary, and must be limited to the preservation of the public safety, the public health, or the public morals. State v. Williams, 253 N.C. 337, 117 S.E.2d 444 (1960), decided under former Art. IX, § 9, Const. 1868, as amended.

**Constitution of 1868 Authorized Regulations on Certification of Teachers.** — Article IX, § 9, Const. 1868, was designed to make, and did make, the powers conferred upon the State Board of Education subject to limitation and revision by acts of the General Assembly. That Constitution, itself, conferred upon the State Board of Education the enumerated powers to regulate the salaries and qualifications of teachers and to make needful rules and regulations in relation to this and other aspects of the administration of the public school system. In the silence of the General Assembly, the authority of the State Board to promulgate and administer further regulations concerning the certification of teachers in the public schools was limited only by other provisions in the Constitution itself. Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

**And Present Constitution Contains Similar Authorization.** — Rules and regulations relating to the certification of teachers being needed for the effective supervision and administration of the public school system, there is no difference in substance between the powers of the State Board of Education authorizing regulations on this matter under Art. IX, § 9, Const. 1868, and this section. Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

**State Board of Education does not have the power to credential speech pathologists** pursuant to their regulatory authority over the qualifications of school employees; the Licensure Act for Speech and Language Pathologists and Audiologists (G.S. 90-292) alone governs the qualification of persons practicing speech pathology, no matter what the setting. North Carolina Bd. of Exmrs. for Speech & Language Pathologists & Audiologists v. North Carolina State Bd. of Educ., 122 N.C. App. 15, 468 S.E.2d 826 (1996), aff'd, 345 N.C. 493, 480 S.E.2d 50 (1997).

**Applied** in Wake Cares, Inc. v. Wake County Bd. of Educ., 190 N.C. App. 1, 660 S.E.2d 217, 2008 N.C. App. LEXIS 872 (2008).

**Cited** in Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972); Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ., — N.C. App. —, 673 S.E.2d 667, 2009 N.C. App. LEXIS 154 (2009).

OPINIONS OF ATTORNEY GENERAL

**Establishing Certified Employees' Salaries and Amount of Work.** — N.C. Const., Art. IX, § 5 and G.S. 115C-12(9), 115C-272(a), 115C-284(c), 115C-296 and 115C-315(d) give the State Board of Education the authority to establish salary schedules for all certified employees and to establish the amount of work required to earn those salaries. See opinion of Attorney General to Mr. James O. Barber, Controller, State Board of Education, 55 N.C.A.G. 1 (1985).

## Sec. 6. State school fund.

The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; all moneys, stocks, bonds, and other property belonging to the State for purposes of public education; the net proceeds of all sales of the swamp lands belonging to the State; and all other grants, gifts, and devises that have been or hereafter may be made to the State, and not otherwise appropriated by the State or by the terms of the grant, gift, or devise, shall be paid into the State Treasury and, together with so much of the revenue of the State as may be set apart for that purpose, shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools.

**History.** — The provisions of this section are similar to those of Art. IX, § 4, Const. 1868, as amended by the Convention of 1875.

**Legal Periodicals.** — For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

For note, "Will North Carolina Vouch for Zelman? Examining the Constitutionality of School Vouchers in North Carolina in the Wake of Zelman v. Simons-Harris," see 81 N.C.L. Rev. 2419 (2003).

CASE NOTES

**Cited** in Rowan County Bd. of Educ. v. United States Gypsum Co., 87 N.C. App. 106, 359 S.E.2d 814 (1987); Rowan County Bd. of Educ. v. United States Gypsum Co., 332 N.C. 1, 418 S.E.2d 648 (1992).

## Sec. 7. County school fund; State fund for certain moneys.

(a) Except as provided in subsection (b) of this section, all moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

(b) The General Assembly may place in a State fund the clear proceeds of all civil penalties, forfeitures, and fines which are collected by State agencies and which belong to the public schools pursuant to subsection (a) of this section. Moneys in such State fund shall be faithfully appropriated by the General Assembly, on a per pupil basis, to the counties, to be used exclusively for maintaining free public schools. (2003-423, s. 1.)

**Cross References.** — As to allocation of revenues to local school administrative units, and definition of "clear proceeds," as referred to in this section, see G.S. 115C-437.

**History.** — The provisions of this section are similar to those of Art. IX, § 5, Const. 1868, as added by the Convention of 1875.

**Editor's Note.** — Session Laws 2003-423, ss. 4 and 5, provide: "The amendment set out in Section 1 of this act shall be submitted to the qualified voters of the State at the statewide general election in November of 2004, which election shall be conducted under the laws then governing elections in the State. Ballots, voting systems, or both may be used in accordance with Chapter 163 of the General Statutes. The question to be used in the voting systems and ballots shall be:

"[ ] FOR [ ] AGAINST

"Constitutional amendment to provide that the General Assembly may place the clear proceeds of civil penalties, civil forfeitures, and civil fines collected by a State agency in a State fund to be used exclusively for maintaining free public schools.

"If a majority of votes cast on the question are in favor of the amendment set out in Section 1 of this act, the State Board of Elections shall certify the amendment to the Secretary of State. The Secretary of State shall enroll the amendment so certified among the permanent records of that office. The amendment set out in Section 1 of this act shall become effective January 1, 2005."

The constitutional amendment proposed by Session Laws 2003-423, s. 1, was adopted by vote of the people at the general election held November 2, 2004, and the results of the election were certified by the State Board of Elections.

**Legal Periodicals.** — For article, "Fines, Penalties, and Forfeitures: An Historical and Comparative Analysis," see 65 N.C.L. Rev. 49 (1986).

For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

For note on the Supreme Court's decision in Hudson v. United States, see 33 Wake Forest L. Rev. 439 (1998).

For note, "Will North Carolina Vouch for Zelman? Examining the Constitutionality of School Vouchers in North Carolina in the Wake of Zelman v. Simons-Harris," see 81 N.C.L. Rev. 2419 (2003).

## CASE NOTES

***Editor's Note.*** *— Some of the cases cited below were decided under former Art. IX, § 5, Const. 1868, as added by the Convention of 1875.*

**This section was designed in its entirety to secure two wise ends,** namely: (1) to set apart the property and revenue specified therein for the support of the public school system; and (2) to prevent diversion of public school property and revenue from their intended use to other purposes. Boney v. Board of Trustees, 229 N.C. 136, 48 S.E.2d 56 (1948); Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976); Cauble v. City of Asheville, 66 N.C. App. 537, 311 S.E.2d 889 (1984), aff'd, 336 S.E.2d 59 (1985).

**This Section Requires Legislation to Give It Effect.** — G.S. 115C-457.1, which created the civil penalty fund, is consistent with the intent and purpose of N.C. Const. art. IX, § 7 that civil penalties be used exclusively to support the State's public schools; because art. IX, § 7 fails to unambiguously specify how that is to be accomplished, it requires legislation to give it effect, and G.S. 115C-457.1 properly articulates the necessary details to effect the constitutional purpose. N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

**The term "penal laws,"** as used in the context of this section, means laws that impose a monetary payment for their violation. The payment is punitive rather than remedial in nature and is intended to penalize the wrongdoer rather than to compensate a particular party. Mussallam v. Mussallam, 321 N.C. 504, 364 S.E.2d 364, rehearing denied, 321 N.C. 116, 367 S.E.2d 915 (1988).

**Penalties, forfeitures and fines are to be used for the support of the public schools.** McMillan v. Robeson County, 262 N.C. 413, 137 S.E.2d 105 (1964).

**When Prescribed as Punishment for Public Wrongs.** — Where fines and penalties are prescribed as a punishment for a violation of public wrongs, i.e., crimes, and such penalties or fines are to be recovered by public authority, the disposition of such recovered fines or penalties comes within the constitutional provision under consideration, and they may not be turned away from the prescribed constitutional course. Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976).

This section appropriates all fines for violation of the criminal laws of the State for establishing and maintaining free public schools in the several counties, whether the fines are for violation of town ordinances made misdemeanors by statute or other criminal statutes. Board of Educ. v. Town of Henderson, 126 N.C. 689, 36 S.E. 158, modified on other grounds, 127 N.C. 8, 37 S.E. 72 (1900).

**And Given by Law to State.** — Under this section penalties and forfeitures belong to the State for free school purposes only when given by law to the State. State ex rel. Carter v. Wilmington & W.R.R., 126 N.C. 437, 36 S.E. 14 (1900).

**Statute purporting to give fines to an individual or another governmental agency violates this section.** Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976).

**As Would Judgment.** — Judgment by a trial judge which seeks to direct payment of a fine anywhere other than to the counties for the use of the public schools is unconstitutional. Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976).

**Municipal Clerk Not Entitled to Fees from Fines.** — By provision of this section, the clear proceeds of fines collected by the clerk of a municipal court belong to the county school fund, and the clerk is not entitled to retain a percentage thereof as his fees, regardless of the provisions of public-local laws relating to his compensation. County Bd. of Educ. v. City of High Point, 213 N.C. 636, 197 S.E. 191 (1938).

**Moneys Voluntarily Paid for Violation of City Ordinances Belong to School Fund.** — Moneys voluntarily paid by motorists to a city upon citations for violations of a city overtime parking ordinance constitute a penalty or fine collected for breach of a state penal law and should be used exclusively for maintaining free public schools in the county pursuant to this section, since violation of a city ordinance is also a violation of G.S. 14-4 which makes the violation of a local ordinance a misdemeanor. Cauble v. City of Asheville, 301 N.C. 340, 271 S.E.2d 258 (1980).

**Two Funds for Public Schools.** — The provisions of this section relating to the clear proceeds from penalties, forfeitures and fines identify two distinct funds for the public schools. These are (1) the clear proceeds of all penalties and forfeitures in all cases, regardless of their nature, so long as they accrue to the state, and (2) the clear proceeds of all fines collected for any breach of the criminal laws. Mussallam v. Mussallam, 321 N.C. 504, 364 S.E.2d 364, rehearing denied, 321 N.C. 116, 367 S.E.2d 915 (1988).

This section establishes two funds for public schools: (1) the clear proceeds of all penalties and forfeitures in all cases, regardless of their nature, so long as they accrue to the state; and (2) the clear proceeds of all fines collected for any breach of the criminal laws. United States v. Winston-Salem/Forsyth County Bd. of Educ., 902 F.2d 267 (4th Cir. 1990).

**Bond Proceeds Held Payable to Board of Education.** — In custody case in which wife sought to regain custody of child who had been removed outside the country, bond set by superior court judge was to ensure husband's appearance, as the punishment for his failure to so appear would be immediate forfeiture of the bond, and since the terms of the bond specifically made its proceeds payable to the state of North Carolina should it be forfeited, such bond was penal in nature and accrued to the Board of Education. Mussallam v. Mussallam, 321 N.C. 504, 364 S.E.2d 364, rehearing denied, 321 N.C. 116, 367 S.E.2d 915 (1988).

**The 1985 amendment to § 115C-437, defining "clear proceeds,"** could only be effective as to monies collected because of traffic violations occurring on and after July 17, 1985. Cauble v. City of Asheville, 314 N.C. 598, 336 S.E.2d 59 (1985).

**Disposition of Parking Fines.** — In the situation of parking fines, the costs of collection often surpass the amounts collected, the intent of the municipality in passing these ordinances being the regulation of traffic rather than the production of revenue. Cauble v. City of Asheville, 66 N.C. App. 537, 311 S.E.2d 889 (1984), aff'd, 314 N.C. 598, 336 S.E.2d 59 (1989).

While it is important that the needs of school children be met, and met generously, it is also important that a municipality feel free to enact ordinances imposing small fines for overtime parking violations without being economically penalized, if indeed the municipality realizes no revenue from enforcement of these ordinances. Cauble v. City of Asheville, 66 N.C. App. 537, 311 S.E.2d 889 (1984), aff'd, 314 N.C. 598, 336 S.E.2d 59 (1989).

Although defining costs of collection is a legislative function, the North Carolina General Assembly has not seen fit to provide municipalities with a formula for determining "clear proceeds" of fines realized from traffic violations. Lacking guidance on the subject, the court would be compelled to resort to a less precise measure in order to allow municipalities to retain the costs of collecting overtime parking fines. Cauble v. City of Asheville, 66 N.C. App. 537, 311 S.E.2d 889 (1984), aff'd, 314 N.C. 598, 336 S.E.2d 59 (1989).

The money penalty collected by a city from a motorist who violates its ordinance prohibiting overtime parking constitutes a penalty or fine collected for the breach of a state penal law, even if the motorist has not been convicted of violating G.S. 14-4. Cauble v. City of Asheville, 314 N.C. 598, 336 S.E.2d 59 (1985).

**The "clear proceeds" of a forfeiture** are defined as the amount of the forfeit less the cost of collection, meaning thereby the citations and process against the bondsman usually in the practice. Hightower v. Thompson, 231 N.C. 491, 57 S.E.2d 763 (1950).

The term "clear proceeds," as used in this section, is synonymous with "net proceeds." Cauble v. City of Asheville, 66 N.C. App. 537, 311 S.E.2d 889 (1984), aff'd, 314 N.C. 598, 336 S.E.2d 59 (1989).

The words "clear proceeds" in this section have been construed to mean the total amount of the fine, penalty, or forfeiture, less only the cost of collection, which, for a bail bond, is the cost of citing and issuing process against the bondsman in the usual manner. In re Dunlap, 66 N.C. App. 152, 310 S.E.2d 415 (1984).

The costs of collection of a fine will be deducted to determine clear proceeds. Cauble v. City of Asheville, 66 N.C. App. 537, 311 S.E.2d 889 (1984), aff'd, 314 N.C. 598, 336 S.E.2d 59 (1989).

Reasonable costs of collection constitutionally may be deducted from the gross proceeds of the fines collected by a city for overtime parking. Cauble v. City of Asheville, 314 N.C. 598, 336 S.E.2d 59 (1985).

**Applicable Forfeitures.** — This section applies only to forfeitures that result from a breach of North Carolina penal law and not to forfeitures initiated by a federal agency because of a violation of federal law. United States v. Winston-Salem/Forsyth County Bd. of Educ., 902 F.2d 267 (4th Cir. 1990).

**A forfeiture initiated by federal authorities and arising from violations of federal law** is not controlled by this section. United States v. Winston-Salem/Forsyth County Bd. of Educ., 902 F.2d 267 (4th Cir. 1990).

**RICO Forfeitures.** — Since the Racketeer Influenced and Corrupt Organizations Act (RICO) provides that the proceeds from the sale of RICO forfeited property accrue to the State, such proceeds must therefore be paid to the public school fund pursuant to this section. State ex rel. Thornburg v. 532 "B" Street, 334 N.C. 290, 432 S.E.2d 684 (1993).

**Forfeitures of § 90-112(d1) Compared.** — The plain language of this section limits its application to forfeitures resulting from a "breach of the penal laws of the State" and G.S. 90-112(d1) of the North Carolina Act refers only to forfeitures "pursuant to this section." United States v. Winston-Salem/Forsyth County Bd. of Educ., 902 F.2d 267 (4th Cir. 1990).

**The test for determining permissible deductions from gross moneys taken in** is that the item, to be deductible, must bear a reasonable relation to the costs of collection of the fine. A determination of costs can be made by qualified accountants, which determination is no more complicated than other problems accountants are daily accustomed to resolving. Cauble v. City of Asheville, 66 N.C. App. 537, 311 S.E.2d 889 (1984), aff'd, 314 N.C. 598, 336 S.E.2d 59 (1989); Harrell v. Harriet & Henderson Yarns, 314 N.C. 566, 336 S.E.2d 47 (1985), decided prior to 1985 amendment to G.S. 115C-437 defining "clear proceeds."

**The costs of collection** do not include the costs associated with enforcing the ordinance, but are limited to the administrative costs of collecting the funds. Cauble v. City of Asheville, 314 N.C. 598, 336 S.E.2d 59 (1985).

**Moneys to be set aside for future enforcement of the law cannot be deducted from "fines"** to arrive at "clear proceeds" of fines. Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976).

**Use of Penal Fines.** — This section provides that the fines collected for any breach of the penal laws shall be used exclusively for the benefit of the public schools. Any judgment of a trial judge which seeks to direct payment of a fine anywhere other than to the counties for the use of the public schools is unconstitutional. Florence v. Hiatt, 101 N.C. App. 539, 400 S.E.2d 118 (1991).

Where a local ordinance was passed to enforce state-mandated air quality standards was a penal law, the penalties imposed for the violation of the ordinance were punitive in nature, and the payment of those penalties was payable to the school board under the mandate of N.C. Const. art. IX, § 7. Donoho v. City of Asheville, 153 N.C. App. 110, 569 S.E.2d 19, 2002 N.C. App. LEXIS 1087 (2002), cert. denied, 356 N.C. 669, 576 S.E.2d 107 (2002), cert. dismissed, 356 N.C. 669, 576 S.E.2d 110 (2003), cert. denied, 356 N.C. 669, 576 S.E.2d 110 (2003).

**Use of Assessments.** — While the court concluded that the assessments made pursuant to G.S. 160A-300.1 and High Point, N.C., Ordinance No. 00-89, § 10-1-306 constituted monetary payments which, although levied in a civil setting, were penal in nature, the assessments did not accrue to the state; therefore, the "civil penalties" assessed a city pursuant to the ordinance were not subject to the requirements N.C. Const. art. IX, § 7, and therefore the school board's motion for summary judgment on the issue was denied. In denying the school board's motion, the court responded to its request for a declaratory ruling as to whether the fines and other amounts received by the city and the other defendants under the statute and the ordinance had to be paid to the school board; such assessments were not required to be appropriated and used exclusively for maintaining free public schools in the county. Shavitz v. City of High Point, 270 F. Supp. 2d 702, 2003 U.S. Dist. LEXIS 11839 (M.D.N.C. 2003).

**What County Is Entitled to Proceeds.** — Neither the Constitution nor any statute enacted by the General Assembly states which county is entitled to receive forfeitures in cases that are started in one county and removed to another. In re Dunlap, 66 N.C. App. 152, 310 S.E.2d 415 (1984).

**A suit to compel a city to pay fines and penalties to the county board of education** should be brought against the city or the board of aldermen, and not against the chief of police. Bearden v. Fullam, 129 N.C. 477, 40 S.E. 204 (1901).

**A school is an institution consisting of a teacher and pupils,** irrespective of age, gathered together for instruction in any branch of learning, the arts or the sciences. Benvenue Parent-Teacher Ass'n v. Nash County Bd. of Educ., 4 N.C. App. 617, 167 S.E.2d 538, appeal dismissed, 275 N.C. 675, 170 S.E.2d 473 (1969).

**A school is public when it is open and public to all in the locality.** Benvenue Parent-Teacher Ass'n v. Nash County Bd. of Educ., 4 N.C. App. 617, 167 S.E.2d 538, appeal dismissed, 275 N.C. 675, 170 S.E.2d 473 (1969).

**A county technical institute** which provides adult vocational and general educational training is a part of the public school system of the State, and the expenditure of funds by a county as authorized by former G.S. 115-234 et seq. for maintenance of a building used by such technical institute does not violate this section. Benvenue Parent-Teacher Ass'n v. Nash County Bd. of Educ., 4 N.C. App. 617, 167 S.E.2d 538, appeal dismissed, 275 N.C. 675, 170 S.E.2d 473 (1969).

**The maintenance of an athletic field and playground is a proper use of school funds,** since physical training is a legitimate function of education. Boney v. Board of Trustees, 229 N.C. 136, 48 S.E.2d 56 (1948).

An agreement under which a graded school district, without monetary consideration, was to transfer in fee to a municipality a tract of school property, and the municipality was to construct thereon an athletic stadium and grant the graded schools of the district free and unlimited use of the stadium and grounds during the school term except when required for regularly scheduled games of a professional baseball association, did not constitute a diversion of school property in contravention of this section. Boney v. Board of Trustees, 229 N.C. 136, 48 S.E.2d 56 (1948).

**Provision in separation agreement that plaintiff pay educational expenses** for children is not violative of this section nor of the U.S. Const., Amend. XIV where such expenses are incurred in attendance at private school. Carpenter v. Carpenter, 25 N.C. App. 235, 212 S.E.2d 911, cert. denied, 287 N.C. 465, 215 S.E.2d 623 (1975).

**Former G.S. 15A-544(h) (see now § 15A-544.1 et seq.), permitting remission of the amounts adjudged forfeited on criminal appearance bonds,** did not violate the constitutional provision that the proceeds of forfeitures are to remain in the several counties and be used in the public schools. State v. Locklear, 42 N.C. App. 486, 256 S.E.2d 830, appeal dismissed, 298 N.C. 302, 259 S.E.2d 303 (1979).

**Federal Forfeiture Law Held Applicable.** — Where city police seized cash from a drug dealer, the city police could share in the proceeds according to federal forfeiture law. Federal and state forfeiture laws did not conflict, as this section applies only to forfeitures resulting from a breach of the penal laws of North Carolina, and the cash in question was forfeited because it was used in violation of a federal law. United States v. Alston, 717 F. Supp. 378 (M.D.N.C. 1989), aff'd, 902 F.2d 267 (4th Cir. 1990), aff'd sub nom. United States v. Winston-Salem/Forsyth County Bd. of Educ., 902 F.2d 267 (4th Cir. 1990).

**Trial court correctly applied the three-year limitations period of G.S. 1-52,** rather than the one-year statute of limitations contained in G.S. 1-54(2), to action by the North Carolina School Boards Association and several boards of education for a declaratory judgment that various monetary payments collected by state agencies were subject to N.C. Const. art. IX, § 7; although G.S. 1-54(2) had been applied to actions commenced by the State upon a statute to collect civil penalties or forfeitures, G.S. 1-54(2) was not applicable in the case at bar because the school boards sought to recover payments provided to the public schools by N.C. Const. art. IX, § 7, and those payments had already been collected by the State. N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

**Payments collected by the North Carolina Plumbing and Heating Board, the North Carolina Electrical Board, the North Carolina Cosmetic Board, and the North Carolina State Bar** for late renewal of occupational licenses or late payment of license fees are remedial in nature and therefore not subject to N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

**Standing to Sue.** — An individual, who was assessed a $50.00 civil penalty for a red light violation detected by cameras installed under the authority of G.S. 160A-300.1 and High Point, N.C., Ordinance No. 00-89, § 10-1-306, launched a challenge to the statute and the ordinance based on N.C. Const. art. IX, § 7; he did not, however, have standing to bring this claim, as he did not allege that (1) there had been a demand on and refusal by the proper authorities to institute proceedings for the protection of the interests of the political agency or political subdivision; or (2) a demand on such authorities would have been useless. Shavitz v. City of High Point, 270 F. Supp. 2d 702, 2003 U.S. Dist. LEXIS 11839 (M.D.N.C. 2003).

**Civil Penalties That Do Not Accrue to the State.** — An individual, who was assessed a $50.00 civil penalty for a red light violation detected by cameras installed under the authority of G.S. 160A-300.1 and High Point, N.C., Ordinance No. 00-89, § 10-1-306, launched a challenge to the statute and the ordinance based on N.C. Const. art. IX, § 7; while the court concluded that the assessments in question constituted monetary payments which, although levied in a civil setting, were penal in nature, the assessments did not accrue to the state. Therefore, the "civil penalties" assessed the city pursuant to its ordinance were not subject to the requirements of N.C. Const. art. IX, § 7. Shavitz v. City of High Point, 270 F. Supp. 2d 702, 2003 U.S. Dist. LEXIS 11839 (M.D.N.C. 2003).

**Payments collected as penalties under the Employment Security Act** are "additional taxes" and thus remedial, rather than punitive, in nature; accordingly, payments collected by the Employment Security Commission pursuant to G.S. 96-10 are not subject to

N.C. Const. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

**Proceeds of penalties that are collected for violation of campus traffic and parking ordinances as "infractions"** under G.S. 116-44.4(g) are subject to N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

**"Civil penalties" imposed by G.S. 116-44.4(h),** which are intended to compensate campuses for the expense of establishing and maintaining parking-and transportation-related services, are remedial in nature and thus are not subject to N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

**Because the North Carolina General Assembly enacted G.S. 116-44.4 pursuant to a clear grant of constitutional authority** to establish a mechanism for administering the "maintenance and management" of traffic and parking on each University of North Carolina campus, G.S. 116-44.4 is constitutional under N.C. Const. art. IX, § 8, which is a co-equal provision with N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

**Broad authority granted to University of North Carolina (UNC) campus trustees under G.S. 116-33,** including the authority to assess fines for the loss, damage, or late return of campus library materials, is intended to promote the remedial purpose of keeping the cost of an education at the several UNC campuses as low as possible; because G.S. 116-33 advances this remedial purpose, the statute is constitutional under N.C. Const. art. IX, § 9, which is a co-equal provision with N.C. Const. art. IX, § 7. Thus, the clear proceeds of payments collected pursuant to G.S. 116-33 are not subject to N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

**Purpose of G.S. 105-113.105 through 105-113.113 is to levy an excise tax to generate revenue for state** and local law enforcement agencies and for the General Fund, which is a remedial purpose; payments collected under G.S. 105-113.105 thus are not subject to N.C. Const. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

**Penalties Collected for Failing to Comply with Statutory or Regulatory Tax Provisions.** — Monetary payments for a taxpayer's noncompliance with a mandate of Chapter 105 are penalties and, therefore, subject to N.C. Const. art. IX, § 7; thus, monies collected by the North Carolina Department of Revenue for late filings, underpayments, and for failing to comply with statutory or regulatory tax provisions are payable to public schools. N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

**Payments by an environmental violator to support a supplemental environmental project** as part of a settlement agreement are still paid because of a civil penalty assessed against the environmental violator; as such, they are punitive in nature and therefore subject to N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

**Payments collected by state agencies as fines or civil penalties assessed against a public school or local school administrative unit need not be remitted** to the Civil Penalty Fund but may instead remain with the collecting State agency, where they may be used for purposes other than maintaining public schools; if payments collected as civil penalties from public schools were subject to N.C. Const. art. IX, § 7, the offending unit would receive back from the School Technology Fund a portion of the fine or penalty assessed against the unit and thus would be unjustly enriched by its own wrongdoing in the sense that it would retain the use of money that would otherwise have been entirely paid to a State agency. N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

**Civil penalties paid by public school systems to state agencies must be remitted to Civil Penalty Fund** for return to all of the public schools in the manner dictated by G.S. 115C-457.3. N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

**Payments authorized by G.S. 20-118(e) are punitive in nature** and are therefore subject to N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

**G.S. 105-267 did not preclude action by the North Carolina School Boards Association** and several boards of education for a declaratory judgment that various monetary payments collected by state agencies were subject to N.C. Const. art. IX, § 7; school boards did not owe any taxes, and their claims against the North Carolina Secretary of Revenue were not brought for the purpose of preventing the collection of any tax but instead to determine the proper disposition of amounts collected by the North Carolina Department of Revenue as statutorily-denominated "penalties" or "additional taxes." N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

**Payments authorized by G.S. 20-309(e) are in the nature of sanctions** and are thus subject to N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

**Penalties assessed as an additional tax under G.S. 105-236** and other provisions of the North Carolina Revenue Act for failure to comply with the tax code are remedial, not punitive, and are thus not subject to N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

**Monies Received for Excise Tax Versus Penalties and Interest Payments.** — Excise tax on unauthorized substances is not a penalty subject to the provisions of N.C. Const. art. IX, § 7 and is, therefore, not payable to public schools; however, the penalties and interest payments collected by the Department of Revenue for enforcement of the excise tax are classified as penalties to be disbursed to public school systems, pursuant to N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

**Allocation of Funds From a City's Red Light Camera Ordinance.** — County board of education was entitled to funds derived from a city's red light camera program, which program was implemented by an ordinance pursuant to G.S. 160A-300.1(c), as N.C. Const. art. IX, § 7 applied to the civil penalties assessed by the city for violations of the ordinance regarding the failure to stop for a red stoplight. Further, pursuant to G.S. 115C-437, the city was to pay 90 percent of the amount collected by its red light camera program to the board. Shavitz v. City of High Point, 177 N.C. App. 465, 630 S.E.2d 4, 2006 N.C. App. LEXIS 1080 (2006), cert. denied, appeal dismissed, 361 N.C. 430, 648 S.E.2d 845 (2007).

**Applied** in State v. Walker, 27 N.C. App. 295, 219 S.E.2d 76 (1975); In re Phillips, 66 N.C. App. 468, 311 S.E.2d 365 (1984); Beaufort County Bd. of Educ. v. Beaufort County Bd. of Comm'rs, 188 N.C. App. 399, 656 S.E.2d 296, 2008 N.C. App. LEXIS 230 (2008).

**Cited** in Wilson County Bd. of Educ. v. Wilson County Bd. of Comm'rs, 26 N.C. App. 114, 215 S.E.2d 412 (1975); Roberson v. Dale, 464 F. Supp. 680 (M.D.N.C. 1979); Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 55 N.C. App. 134, 285 S.E.2d 110 (1981); Britt v. North Carolina State Bd. of Educ., 86 N.C. App. 282, 357 S.E.2d 432 (1987); State ex rel. Thornburg v. Currency in Amount of $52,029.00, 324 N.C. 276, 378 S.E.2d 1 (1989); Francine Delany New Sch. for Children, Inc. v. Asheville City Bd. of Educ., 150 N.C. App. 338, 563 S.E.2d 92, 2002 N.C. App. LEXIS 490 (2002); Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ., — N.C. App. —, 673 S.E.2d 667, 2009 N.C. App. LEXIS 154 (2009).

## OPINIONS OF ATTORNEY GENERAL

**Confiscated Drugs.** — If federal authorities confiscate drug related property and thereafter return a part of it to local authorities for law enforcement purposes, the North Carolina Constitution and laws do not require these funds to go to the local school board as forfeited property and they may be used by local law enforcement. See opinion of the Attorney General to Mr. Aubrey S. Tomlinson, Jr., Attorney for Franklin County, 57 N.C.A.G. 51 (1988).

**Monies collected by a city from motorists who violate its ordinance prohibiting overtime parking** do not constitute a penalty for a breach of a State penal law, and such "clear proceeds" need, therefore, not be used for the county schools pursuant to this section but may be kept by the city. See opinion of Attorney General to The Honorable C. Colon Willoughy, Jr., District Attorney, Tenth Judicial District, 1997 N.C.A.G. 58 (9/16/97).

**Disposition of Proceeds of Environmental Civil Penalties.** — The proceeds of environmental civil penalties controlled by this section, which were collected from offending local school administrative units before September 1, 1997, may not be returned to the offending local units but rather should be deposited into the General Fund. The proceeds of environmental civil penalties controlled by this section which are collected from offending local school administrative units on or after September 1, 1997, may not be returned to the offending local units. However, in compliance with G.S. 115C-457.1 et seq., these funds should be remitted to the Civil Penalty and Forfeiture Fund, transferred to the State School Technology Fund, and allocated to all eligible local school administrative units, except the offending unit, on the basis of average daily membership. See opinion of Attorney General to Richard Whisnant, General Counsel Department of Environment, Health & Natural Resources, 1997 N.C.A.G. 65 (11/4/97).

**Counties do not have a sound legal basis for contesting the action of the United States Attorney in confiscating drug related property** where all aspects of the investigation, search, arrest and seizure are handled by State law enforcement officials and all criminal charges are in State court. Where federal agents participate in the investigation, arrest or seizure the county has no legal standing. See opinion of the Attorney General to Mr. Aubrey S. Tomlinson, Jr., Attorney for Franklin County, 57 N.C.A.G. 51 (1988).

## Sec. 8. Higher education.

The General Assembly shall maintain a public system of higher education, comprising The University of North Carolina and such other institutions of higher education as the General Assembly may deem wise. The General Assembly shall provide for the selection of trustees of The University of North Carolina and of the other institutions of higher education, in whom shall be vested all the privileges, rights, franchises, and endowments heretofore granted to or conferred upon the trustees of these institutions. The General Assembly may enact laws necessary and expedient for the maintenance and management of The University of North Carolina and the other public institutions of higher education.

**History.** — The provisions of this section are similar to those of Art. IX, § 6, Const. 1868, as added in 1872 — 1873.

### CASE NOTES

**Rule-Making Power of Trustees of University.** — Under the Constitution and statutes of this State, the management of The University of North Carolina is delegated to and invested in the board of trustees, and the board of trustees may make all necessary, proper and reasonable rules and regulations for the orderly management and government of The University of North Carolina and for the preservation of discipline of its students. In re Carter, 262 N.C. 360, 137 S.E.2d 150 (1964), decided under former Art. IX, § 6, Const. 1868.

**Because the North Carolina General Assembly enacted G.S. 116-44.4 pursuant to a clear grant of constitutional authority** to establish a mechanism for administering the "maintenance and management" of traffic and parking on each University of North Carolina campus, G.S. 116-44.4 is constitutional under N.C. Const. art. IX, § 8, which is a co-equal provision with N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

### OPINIONS OF ATTORNEY GENERAL

**TACIT Program Upheld.** — The TACIT Program, offered by North Carolina State University's Department of Urban Affairs to units of local government to educate employees with respect to selecting appropriate computer equipment, does not violate the provisions of G.S. 66-58. See opinion of Attorney General to Mr. George E. Tatum, Register of Deeds, Cumberland County, 55 N.C.A.G. 101 (1986).

## Sec. 9. Benefits of public institutions of higher education.

The General Assembly shall provide that the benefits of The University of North Carolina and other public institutions of higher education, as far as practicable, be extended to the people of the State free of expense.

**History.** — The provisions of this section are similar to those of Art. IX, § 7, Const. 1868.

**Legal Periodicals.** — For comment on state regulation of private religious schools, see 16 Wake Forest L. Rev. 405 (1980).

### CASE NOTES

**Broad authority granted to University of North Carolina (UNC) campus trustees under G.S. 116-33,** including the authority to assess fines for the loss, damage, or late return of campus library materials, is intended to promote the remedial purpose of keeping the cost of an education at the several UNC campuses as low as possible; because G.S. 116-33 advances this remedial purpose, the statute is constitutional under N.C. Const. art. IX, § 9, which is a co-equal provision with N.C. Const. art. IX, § 7. Thus, the clear proceeds of payments collected pursuant to G.S. 116-33 are not subject to N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

**Cited** in Gwathmey v. State ex rel. Dep't of Env't, Health & Natural Resources, 342 N.C. 287, 464 S.E.2d 674 (1995).

### OPINIONS OF ATTORNEY GENERAL

**Local School Administrative Unit Levying Taxes at Local Level.** — The legislature may by statute, consistently with the Constitution, provide that a local school administrative unit may levy taxes at the local level but such taxing authority must be conferred either by a general law, applicable statewide, or by local act subject to a vote of those persons affected. See opinion of Attorney General to Mr. John B. Dunn, Superintendent, Edenton-Chowan Schools, 60 N.C.A.G. 17 (April 24, 1990).

**TACIT Program Upheld.** — The TACIT Program, offered by North Carolina State University's Department of Urban Affairs to units of local government to educate employees with respect to selecting appropriate computer equipment, does not violate the provisions of G.S. 66-58. See opinion of Attorney General to Mr. George E. Tatum, Register of Deeds, Cumberland County, 55 N.C.A.G. 101 (1986).

## Sec. 10. Escheats.

(1) *Escheats prior to July 1, 1971.* All property that prior to July 1, 1971, accrued to the State from escheats, unclaimed dividends, or distributive shares of the estates of deceased persons shall be appropriated to the use of The University of North Carolina.

(2) *Escheats after June 30, 1971.* All property that, after June 30, 1971, shall accrue to the State from escheats, unclaimed dividends, or distributive shares of the estates of deceased persons shall be used to aid worthy and needy students who are residents of this State and are enrolled in public institutions of higher education in this State. The method, amount, and type of distribution shall be prescribed by law. (1969, c. 827, § 1.)

**History.** — The provisions of this section are similar to those of Art. IX, § 7, Const. 1868.

**Editor's Note.** — The amendment adopted by vote of the people at the general election held Nov. 3, 1970, effective July 1, 1971, designated the former provisions of this section as subsection (1) and made changes therein so as to restrict the subsection's application to escheats prior to July 1, 1971, and added subsection (2).

### CASE NOTES

**The right of succession by escheat** to all property, when no wife or husband or parties are entitled to inherit or take under the statutes of descent and distribution, was conferred upon The University of North Carolina by this section, and extended by several statutes. Board of Educ. v. Johnston, 224 N.C. 86, 29 S.E.2d 126 (1944), decided under former Art. IX, § 7, Const. 1868.

# ARTICLE X

# HOMESTEADS AND EXEMPTIONS

## Section 1. Personal property exemptions.

The personal property of any resident of this State, to a value fixed by the General Assembly but not less than $500, to be selected by the resident, is exempted from sale under execution or other final process of any court, issued for the collection of any debt.

**Cross References.** — As to exempt property, see G.S. 1C-1601 et seq.

**History.** — The provisions of this section are similar to those of Art. X, § 1, Const. 1868.

**Legal Periodicals.** — For note on the nonpurchase security agreement as a relinquishment of the personal property exemption, see 15 Wake Forest L. Rev. 708 (1979).

For note on enforcement of separation agreements by specific performance, see 16 Wake Forest L. Rev. 117 (1980).

For article on North Carolina's new Exemption Act, see 17 Wake Forest L. Rev. 865 (1981).

For article analyzing North Carolina's exemptions law, see 18 Wake Forest L. Rev. 1025 (1982).

## CASE NOTES

***Editor's Note.*** — *Some of the cases cited below were decided under former Art. X, § 1, Const. 1868.*

**Exemption Is a Constitutional Right.** — The right to the personal property exemption exists not by virtue of the allotment, but by virtue of the Constitution, which confers it and attaches the protection to the debtor before the allotment or appraisal. Lockhart v. Bear, 117 N.C. 298, 23 S.E. 484 (1895). See also, Crow v. Morgan, 210 N.C. 153, 185 S.E. 668 (1936).

This section and N.C. Const., Art. X, § 2 are explicit in guaranteeing to every resident of the State his homestead and personal property exemption of the value fixed, "to be selected by the owner thereof." McKeithen v. Blue, 142 N.C. 360, 55 S.E. 285 (1906).

**Section 1C-1601(c) and Section 1C-1603(e)(2) are Unconstitutional.** — Section 1C-1601(c) and section 1C-1603(e)(2), as they attempt to limit the claiming of constitutional exemptions to 20 days after notice to designate is served, are unconstitutional. HFC v. Ellis, 107 N.C. App. 262, 419 S.E.2d 592 (1992), cert. granted, 333 N.C. 167, 424 S.E.2d 909 (1992).

**As to liberal construction of this section,** see Hyman v. Stern, 43 F.2d 666 (4th Cir. 1930).

**Law Protects Owner Only for Loss of Exempt Property Under Final Process.** — The law protects the owner not from destitution, but only from loss of exempt property due to sale under final process for the collection of any debt. Montford v. Grohman, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978).

**The exemption provisions in the Constitution do not make special allowances for a resident's sole remaining assets.** Montford v. Grohman, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978).

**Debtor Entitled to Exemption at All Times.** — The $500.00 personal property exemption prescribed by this section entitles a judgment debtor to the amount of the exemption at all times, and such sum may be set apart for the comfort and support of the judgment debtor as often as the judgment debtor may be pressed with execution. Commissioner of Banks ex rel. Goldsboro Sav. & Trust Co. v. Yelverton, 204 N.C. 441, 168 S.E. 505, commented on in 12 N.C.L. Rev. 65 (1934).

**And From Time to Time.** — The $500.00 personal property exemption guaranteed by this section must be allotted from time to time as often as the judgment debtor might be pressed with execution, the policy being to enable him not only to have the exemptions allotted to him once, but to keep them about him all the time, for the comfort and support of himself and his family. New Amsterdam Cas. Co. v. Waller, 196 F. Supp. 780 (M.D.N.C. 1961), rev'd on other grounds, 301 F.2d 839 (4th Cir. 1962).

When any final process against the debtor's estate is to be enforced, that much of his estate must be allowed to remain with him as is not liable to sale. Gardner v. McConnaughey, 157 N.C. 481, 73 S.E. 125 (1911). See also, Campbell v. White, 95 N.C. 344 (1886).

**But Exempt Funds on Hand May Not Exceed Constitutional Amount.** — A judgment debtor may claim his exemption as against successive executions, but may not have exempt funds in his possession at any one time in excess of his exemption. Stated another way, a judgment debtor is privileged to make successive claims for his exemption, but may not hold free from execution at any one time an amount in excess of his exemption. New Amsterdam Cas. Co. v. Waller, 196 F. Supp. 780 (M.D.N.C. 1961), rev'd on other grounds, 301 F.2d 839 (4th Cir. 1962).

**Neither this section nor § 1C-1601(a) confers any property exemptions on past residents of this State.** Indeed, the constitutional and statutory provisions both contemplate the possibility that changes in the debtor's residency or other changing circumstances may warrant subsequent modification of the debtor's right to constitutional or statutory exemptions. First Union Nat'l Bank v. Rolfe, 90 N.C. App. 85, 367 S.E.2d 367 (1988).

**Residency.** — Irrespective of defendant's resident status previously, the trial court correctly determined defendant's residency based upon the evidence at the 1987 hearing. First Union Nat'l Bank v. Rolfe, 90 N.C. App. 85, 367 S.E.2d 367 (1988).

**Where the only evidence supporting defendant's contention of residency was her statement that she "hoped" to return to**

**this state** as soon as her sister's estate in Ireland was settled, this general declaration did not of itself defeat the trial court's findings of nonresidency, in light of the other facts of the case, especially the undisputed evidence that defendant had moved to Ireland (her place of citizenship) at least one year previously, had no dwelling in this state, and offered no definite plan to return. First Union Nat'l Bank v. Rolfe, 90 N.C. App. 85, 367 S.E.2d 367 (1988).

**Time for Claiming Exemption.** — Until there has been a levy on personal property, no occasion for application of the constitutional exemption arises. New Amsterdam Cas. Co. v. Waller, 301 F.2d 839 (4th Cir. 1962).

The constitutional exemption can be claimed only at the moment of levy. New Amsterdam Cas. Co. v. Waller, 323 F.2d 20 (4th Cir. 1963), cert. denied, 376 U.S. 963, 84 S. Ct. 1124, 11 L. Ed. 2d 981 (1964).

It is only when property is about to be subjected to the payment of a debt by final process that the last opportunity is left to the defendant to claim his exemption. At any time before this stage of the proceeding is reached, he may make his demand and become entitled to an allotment of the exemption. Chemical Co. v. Sloan, 136 N.C. 122, 48 S.E. 577 (1904).

The defendant may demand his exemption when a warrant of attachment is levied on his property and it is taken out of his possession, or he may wait until the final process is issued and the property is about to be appropriated by sale to the satisfaction of the same. Chemical Co. v. Sloan, 136 N.C. 122, 48 S.E. 577 (1904).

A debtor may legally demand his personal property exemption at any time and up to the last moment before the appropriation thereof by the court, and the order of court directing a payment of the money derived from the sale of such property is final process within the meaning of the Constitution, giving the creditor such right until execution or other final process. Befarrah v. Spell, 178 N.C. 231, 100 S.E. 321 (1919); Crow v. Morgan, 210 N.C. 153, 185 S.E. 668 (1936).

**Debtor May Voluntarily Bargain Away Exemption Right.** — In cases of foreclosure of mortgages or of taking possession of collateral after default, no right to possession of property otherwise exempt remains in the debtor, who has voluntarily bargained it away. Montford v. Grohman, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978).

**Legislature Has Not Prevented Debtor from Transferring Interest in Property to Another.** — The legislature has seen fit to surround the family home with certain protections against the demands of urgent creditors to put it beyond the reach of those financial misfortunes which even the most prudent and sagacious cannot always avoid. It has not seen fit to prevent a debtor from "selling" or otherwise transferring an interest in that property to another, thereby giving the other priority of right to possession of the collateral. The constitutional exemption operates against general creditors so as to allow the debtor to retain his most valued $500.00 of property in the face of their executions. It does not operate so as to hinder secured creditors from realizing on the terms of their bargain. Montford v. Grohman, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978).

**Security Interest Has Replaced Chattel Mortgage as Protection of Creditor.** — Before the enactment of the Uniform Commercial Code, a debtor could subject his personal property to a chattel mortgage, and if he did so, the property was liable for the mortgage debt first and the debtor's exemption was allotted only in the amount of the surplus. An Article 9 security interest by the terms of the Uniform Commercial Code replaces the chattel mortgage as a method of protecting the creditor. Montford v. Grohman, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978).

**Debtor divested herself of right to possession of personal property by terms of consumer loan contract** with her creditor whereby the creditor obtained a security interest in all of her personal property, including her household furnishings. When the debtor defaulted, the creditor had an immediate right to possess all articles in which she had given a security interest. However, this right must be distinguished from any interest which a creditor might seek under an executory waiver of the right to exemption. It has long been held that a debtor cannot be bound by any agreement to waive his exemption in case of levy upon his property. Montford v. Grohman, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978).

**Forfeiture of Exemption.** — A bankrupt who conceals assets exceeding in value his statutory exemption forfeits his right to such exemption. Hyman v. Stern, 43 F.2d 666 (4th Cir. 1930).

**Exemption May Not Frustrate Laws Relating to Fraudulent Conveyances.** — The constitutional exemption is not a sword for frustration of the laws relating to fraudulent conveyances. New Amsterdam Cas. Co. v. Waller, 323 F.2d 20 (4th Cir. 1963), cert. denied, 376 U.S. 963, 84 S. Ct. 1124, 11 L. Ed. 2d 981 (1964).

**Exemption Ceases at Death of Claimant.** — The personal property exemption provided for by this section and the laws passed pursuant thereto exists only during the life of the homesteader, and after his death passes to his personal representative to be disposed of in due course of administration. Johnson v. Cross, 66 N.C. 167 (1872).

**One who is a fugitive from justice,** even though he has left his family here, who cannot be found in this State and whose whereabouts are unknown, and the object of whose absence is to avoid serving a criminal sentence imposed by the courts, is not a resident of the State within the meaning of this section, and is not entitled to his exemptions in the absence of evidence or findings on the question of his animus revertendi. Cromer v. Self, 149 N.C. 164, 62 S.E. 885, 128 Am. St. R. 658 (1908).

**The husband's duty to protect and provide for his wife** is more than a debt in the ordinary acceptation of the word, or within the contemplation of this section and N.C. Const., Art. X, § 2(1). Anderson v. Anderson, 183 N.C. 139, 110 S.E. 863 (1922).

A husband's obligation to support his wife during the existence of the marital relation is not a "debt" within the meaning of this section and N.C. Const., Art. X, § 2(1). Barber v. Barber, 217 N.C. 422, 8 S.E.2d 204 (1940), citing White v. White, 179 N.C. 592, 103 S.E. 216 (1920).

**Counterclaim and Setoff.** — A party may not demand that his claim be allowed him as his personal property exemption so as to defeat the adverse party's right of counterclaim or setoff prior to rendition of the final judgment on his claim, since to permit the party to asset the exemption before judgment would enable him to obtain judgment in instances in which, if a balance were struck, nothing would be due him. Edgerton v. Johnson, 218 N.C. 300, 10 S.E.2d 918 (1940). For note on this case, see 19 N.C.L. Rev 227 (1941).

Where plaintiff moved that the judgment rendered against him in this cause on defendant's counterclaim should be offset by a judgment subsequently obtained by plaintiff against defendant in a separate action, contending that defendant was insolvent, and defendant demanded that the judgment rendered in his favor upon the counterclaim in the cause be allowed to him as his personal property exemption, it was held that to allow offset would amount to "final process" within the meaning of this section, and defendant's demand that the judgment in his favor on the counterclaim be allowed him as his personal property exemption precluded plaintiff's right of offset. Edgerton v. Johnson, 218 N.C. 300, 10 S.E.2d 918 (1940). For note on this case, see 19 N.C.L. Rev. 227 (1941).

**Cited** in In re Mims, 49 Bankr. 283 (Bankr. E.D.N.C. 1985); First Union Nat'l Bank v. Rolfe, 83 N.C. App. 625, 351 S.E.2d 117 (1986); Kroh v. Kroh, 154 N.C. App. 198, 571 S.E.2d 643, 2002 N.C. App. LEXIS 1404 (2002).

## Sec. 2. Homestead exemptions.

(1) *Exemption from sale; exceptions.* Every homestead and the dwellings and buildings used therewith, to a value fixed by the General Assembly but not less than $1,000, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city or town with the dwellings and buildings used thereon, and to the same value, owned and occupied by a resident of the State, shall be exempt from sale under execution or other final process obtained on any debt. But no property shall be exempt from sale for taxes, or for payment of obligations contracted for its purchase.

(2) *Exemption for benefit of children.* The homestead, after the death of the owner thereof, shall be exempt from the payment of any debt during the minority of the owner's children, or any of them.

(3) *Exemption for benefit of surviving spouse.* If the owner of a homestead dies, leaving a surviving spouse but no minor children, the homestead shall be exempt from the debts of the owner, and the rents and profits thereof shall inure to the benefit of the surviving spouse until he or she remarries, unless the surviving spouse is the owner of a separate homestead.

(4) *Conveyance of homestead.* Nothing contained in this Article shall operate to prevent the owner of a homestead from disposing of it by deed, but no deed made by a married owner of a homestead shall be valid without the signature and acknowledgement of his or her spouse. (1977, c. 80, ss. 1, 2.)

**Cross References.** — As to exempt property, see G.S. 1C-1601 et seq. As to conveyances by husband and wife, see G.S. 39-7 et seq.

**History.** — The provisions of subsection (1) of this section are similar to those of Art. X, § 2, Const. 1868. The provisions of subsection (2) are similar to those of Art X, § 3, Const. 1868. The provisions of subsection (3) are similar to those of Art. X, § 5, Const. 1868. The provisions of subsection (4) are similar to those of Art. X,

§ 8, Const. 1868, as amended in 1944.

**Legal Periodicals.** — For comment as to whether North Carolina really has a homestead exemption, see 2 Wake Forest Intra. L. Rev. 53 (1966).

For note on the non-purchase security agreement as a relinquishment of the personal property exemption, see 15 Wake Forest L. Rev. 708 (1979).

For article on debtors' exemption rights under the Bankruptcy Reform Act, see 58 N.C.L. Rev. 769 (1980).

For note on enforcement of separation agreements by specific performance, see 16 Wake Forest L. Rev. 117 (1980).

## CASE NOTES

I. Homestead Exemption Generally.
II. Exemption for Benefit of Children.
III. Exemption for Benefit of Spouse.
IV. Conveyance of Homestead.

### I. HOMESTEAD EXEMPTION GENERALLY.

*Editor's Note. — Many of the cases cited below were decided under corresponding provisions of the Constitution of 1868.*

**The right to a homestead is guaranteed by the Constitution.** Williams v. Johnson, 230 N.C. 338, 53 S.E.2d 277 (1949).

**Homestead and Personal Property Exemptions Distinguished.** — The homestead exemption is permanent unless there is a reallotment by reason of an increase in value. But the personal property exemption is to be reassigned whenever, at subsequent dates, executions are levied. The reason is that the realty is fixed and stable, whereas the articles of personal property may be increased or diminished in quantity between the levy of executions. Gardner v. McConnaughey, 157 N.C. 481, 73 S.E. 125 (1911).

**Power to Increase Value of Homestead Exemption.** — The Constitution expressly vests in the General Assembly, not in the courts, the exclusive power to increase the value of the homestead exemption. Seeman Printery, Inc. v. Schinhan, 34 N.C. App. 637, 239 S.E.2d 744 (1977), appeal dismissed, 294 N.C. 442, 241 S.E.2d 844 (1978).

Comparison of former section with present subsection (1) of this section reveals that the major difference is that under the former the homestead could not exceed $1000 in value, while under the present Constitution the homestead shall be to a value fixed by the General Assembly but not less than $1000. Seeman Printery, Inc. v. Schinhan, 34 N.C. App. 637, 239 S.E.2d 744 (1977), appeal dismissed, 294 N.C. 442, 241 S.E.2d 844 (1978).

**Present Possessory Interest Necessary for Homestead Exemption Claim.** — In this State, a homestead exemption may not be claimed in property in which the claimant has no present possessory interest at the time the claim is made. In re Hudson, 4 Bankr. 337 (Bankr. E.D.N.C. 1980).

**Ownership Interest Required.** — Under North Carolina law, an individual must have an ownership interest in residential property in order to claim a homestead exemption in the property. Hollar v. United States, 184 Bankr. 25 (Bankr. M.D.N.C.), aff'd, 188 Bankr. 539 (M.D.N.C. 1995), aff'd, 92 F.3d 1179 (4th Cir. 1996).

**Extent of Exemption of Dwelling House.** — The constitutional and statutory enactments relating to the homestead exemption cannot be so construed as to permit exemption of an entire usable dwelling house, regardless of its value. Seeman Printery, Inc. v. Schinham, 34 N.C. App. 637, 239 S.E.2d 744 (1977), appeal dismissed, 294 N.C. 442, 241 S.E.2d 844 (1978).

**Effect of Allotment Useless to Debtor which Impairs Value of Remaining Property.** — Where the debtor requested that the allotment of his homestead begin at a point at the front door of his dwelling, with the result that the entire area allotted was located in the hallway adjacent to the front door of the house, the fact that the allotment was useless to the debtor and impaired the value of the remaining property available for satisfaction of the creditor's judgment did not entitle the debtor to claim his exemption in the entire dwelling. Seeman Printery, Inc. v. Schinhan, 34 N.C. App. 637, 239 S.E.2d 744 (1977), appeal dismissed, 294 N.C. 442, 241 S.E.2d 844 (1978).

**Residence of Debtor.** — For case in which evidence was insufficient to support finding by the court that judgment debtor was resident and entitled to homestead, see S.D. Scott & Co. v. Jones, 230 N.C. 74, 52 S.E.2d 219 (1949).

**Duration of Homestead.** — The homestead as allowed lasts during the life of the owner thereof; and, after his death, it lasts during the minority of his children, or any one of them, and the widowhood of his widow (now spouse), unless she be the owner of a homestead in her own right. Williams v. Johnson, 230 N.C. 338, 53 S.E.2d 277 (1949).

**Presumption of Continuance.** — Once acquired, the homestead is presumed to continue. Williams v. Johnson, 230 N.C. 338, 53 S.E.2d 277 (1949).

**The only way property may lose its homestead character,** after the homestead has been allotted, is by death, abandonment or alienation. Williams v. Johnson, 230 N.C. 338, 53 S.E.2d 277 (1949).

**Homestead interest in land is terminated by the owner's removal from the State.** S.D. Scott & Co. v. Jones, 230 N.C. 74, 52 S.E.2d 219 (1949).

**The right to the homestead exemption is not forfeited by a fraudulent conveyance,** and a judgment was properly modified by order directing that defendant be allotted his homestead in the land, which should be exempt from sale by the commissioner. New Amsterdam Cas. Co. v. Dunn, 209 N.C. 736, 184 S.E. 488 (1936).

**Exemption Allowed in Mortgaged Lands.** — A debtor may have his homestead exemption allotted in lands owned by him but mortgaged to a third person, but in ascertaining the value thereof the mortgage debt should be disregarded, and the land appraised as though the debtor owned the unencumbered fee. Crow v. Morgan, 210 N.C. 153, 185 S.E. 668 (1936).

**And in Vacant Lots.** — Where the only real property owned by a judgment debtor consists of vacant lots, he may claim his homestead therein, since he may thereafter build an habitable structure thereon. Equitable Life Assurance Soc'y v. Russos, 210 N.C. 121, 185 S.E. 632 (1936).

**Doctrine of estoppel cannot deny a bankrupt his right to a homestead** in lands which were subject to his debts. In selecting the land for his homestead exemption, he is not restricted to the tract on which he lives. In re Hamrick, 56 F.2d 240 (W.D.N.C. 1932).

**Waiver of Homestead Right.** — The right to claim homestead may be lost by failure to assert it in apt time, by waiver, or by estoppel. Cameron v. McDonald, 216 N.C. 712, 6 S.E.2d 497 (1940).

**Involuntary Absence Did Not Constitute Abandonment of Residence.** — Claimed homestead exemption was allowed, pursuant to G.S. 1C-1601(a)(1), over a trustee's objection because the debtor was forced to vacate and did not voluntarily abandon her damaged home as a result of hurricanes and she paid property taxes, stored personalty there, lived in temporary housing, and intended to use the home as a residence as soon as repairs were practicable. In re Foster, 348 B.R. 58, 2006 Bankr. LEXIS 1833 (Bankr. E.D.N.C. 2006).

**Waiver Shown.** — A written request by judgment debtors to the sheriff to sell lands under execution without the allotment of homestead, to the end that the property might bring the highest price possible, and joinder of the judgment debtors in the sheriff's deed to the purchaser, constituted an authorization and ratification of the act of the sheriff in making the execution sale without allotment of homestead and was a valid waiver by the judgment debtors of their homestead exemption in regard to that particular execution. North Carolina Joint Stock Land Bank v. Bland, 231 N.C. 26, 56 S.E.2d 30 (1949).

Where defendants made no objection to the sale of real property under execution without allotting the homestead until five months after the sale was completed, where the real property was sold to third parties in the meantime, and where the femme defendant was present at the sale and did not request the allotment of a homestead, these facts constituted a waiver by the defendants of their right to have the homestead allotted. North Carolina Nat'l Bank v. Sharpe, 49 N.C. App. 687, 272 S.E.2d 368 (1980), appeal dismissed, 302 N.C. 217, 276 S.E.2d 916 (1981).

**Creditors Without Standing to Complain of Waiver.** — Homestead is a right created for the benefit of the judgment debtor, and therefore other judgment creditors cannot complain of a waiver by the debtor of this right in designated realty as to a particular judgment. North Carolina Joint Stock Land Bank v. Bland, 231 N.C. 26, 56 S.E.2d 30 (1949).

**Right May Be Sold or Assigned.** — The homestead right or estate is salable or assignable, and the purchaser can hold the land to which it pertains to the exclusion of judgment creditors during its existence. Gardner v. Batts, 114 N.C. 496, 19 S.E. 794 (1894).

The owner of lands loses his right to a homestead therein allowed by this section upon his conveying the title to the same, by deed, though he may select a homestead thereafter in other of his lands. Duplin County v. Harrell, 195 N.C. 445, 142 S.E. 481 (1928).

**Allotment Unnecessary.** — The title to the homestead is vested in the owner by the Constitution of this State, and no allotment by the sheriff is necessary to vest the title thereto. The allotment by the sheriff is only for the purpose of ascertaining whether there is an excess of property over the homestead which is subject to execution. Lambert v. Kinnery, 74 N.C. 348 (1876).

**Land must be selected by the owner and allotted before it becomes exempt.** It must also be both owned and occupied by the homesteader, and this at the time of issuance of the execution. Chadbourn Sash, Door & Blind Co. v. Parker, 153 N.C. 130, 69 S.E. 1 (1910).

**Where a judgment debtor is present when his homestead in his land is laid off** to him by the appraisers, and he designates the land he desires for the purpose, he may not successfully contend thereafter that other lands should have been included, it not being contended that the value of the homestead as allotted was less than $1,000.00. Citizens Bank v. Robinson, 201 N.C. 796, 161 S.E. 487 (1931).

**Where a mortgage on land is foreclosed** and the land brings at the foreclosure sale a sum more than sufficient to pay the mortgage debt, the surplus remaining to the constitutional limit of $1,000.00 is to be regarded as realty to which the homestead right attaches when the same has not been waived. Farris v. Hendricks, 196 N.C. 439, 146 S.E. 73 (1929).

A mortgagor of lands is entitled to his homestead exemption in his equity of redemption as against the liens of judgment creditors, and an injunction will lie against the sale of the property under execution when his homestead has not been allotted. Cheek v. Walden, 195 N.C. 752, 143 S.E. 465 (1928).

**There is no lien for purchase money** in North Carolina, and while the judgment debtor cannot claim homestead as against a judgment for purchase money, the lien of a mortgage executed to a third person has priority over the judgment lien, when the mortgage is executed prior to the rendition of the judgment and prior to an amendment putting the title to the property in issue. Jarrett v. Holland, 213 N.C. 428, 196 S.E. 314 (1938).

**A duly docketed judgment** is a lien on the lands of the judgment debtor, but is subject to the homestead interest in the lands as provided by this section. Farris v. Hendricks, 196 N.C. 439, 146 S.E. 73 (1929).

**Cited** in Kroh v. Kroh, 154 N.C. App. 198, 571 S.E.2d 643, 2002 N.C. App. LEXIS 1404 (2002).

### II. EXEMPTION FOR BENEFIT OF CHILDREN.

**As to the unconditional right of exemption given to the children,** see Spence v. Goodwin, 128 N.C. 273, 38 S.E. 859 (1901).

**The debt** referred to in subsection (2) of this section means the debt of the owner of the homestead, and not the debt of the infant children. Bruton v. McRae, 125 N.C. 206, 34 S.E. 397 (1899).

**Only Minor Children Included.** — Twenty-one year old heir is not entitled to homestead in the lands of his ancestor; his right thereto ceased as soon as he attained his majority. Saylor v. Powell, 90 N.C. 202 (1884).

**Where Only One Child a Minor.** — Where the owner of a homestead dies, leaving children, some of age and one a minor, the homestead estate vests alone in the minor child until his or her majority. Simpson v. Wallace, 83 N.C. 477 (1880).

**Pecuniary Standing of Children Not Considered.** — The right of a homestead is given to the minor children of an insolvent father, regardless of their pecuniary circumstances. Allen v. Shields, 72 N.C. 504 (1875); Spence v. Goodwin, 128 N.C. 273, 38 S.E. 859 (1901).

**Right Not Waivable by Guardian Ad Litem.** — A guardian ad litem cannot waive the homestead rights of infant heirs, especially when there is no consideration therefor, for such waiver would affect the substantial rights of the infants. Spence v. Goodwin, 128 N.C. 273, 38 S.E. 859 (1901).

**Right Not to Be Sold for Assets.** — In a proceeding to sell land for assets, the executor cannot sell the homestead interest of a minor child and devisee of the testator. Bruton v. McRae, 125 N.C. 206, 34 S.E. 397 (1899).

### III. EXEMPTION FOR BENEFIT OF SPOUSE.

**Ownership at Death Essential.** — It is only when the husband (now spouse) is the owner of a homestead at the time of his death that the exemption from debts inures to surviving spouse's benefit. Thomas v. Bunch, 158 N.C. 175, 73 S.E. 899 (1912).

**A widow (now surviving spouse) is not required to take action for the preservation of the right** to a homestead in the lands of deceased husband (spouse) under the provisions of this section, and before the lands can be validly sold by the personal representatives to make assets for payment of the debts of the deceased the homestead must first be assigned. Fulp v. Brown, 153 N.C. 531, 69 S.E. 612 (1910).

**For case holding that widow was not entitled to homestead where husband left adult children by another marriage,** see Simmons v. Respass, 151 N.C. 5, 65 S.E. 516 (1909).

### IV. CONVEYANCE OF HOMESTEAD.

**Subsection (4) Applies After Allotment of Homestead.** — Subsection (4) of this section applies only to a conveyance of the homestead after it has been laid off. Mayho v. Cotton, 69 N.C. 289 (1873), approved in Dalrymple v. Cole, 170 N.C. 102, 86 S.E. 988 (1915). See also, Hager v. Nixon, 69 N.C. 108 (1873).

The provisions of subsection (4) of this section do not become effective, and do not begin to operate, until an allotment of the homestead is made to the husband (spouse). Dalrymple v. Cole, 170 N.C. 102, 86 S.E. 988 (1915).

**Joinder of Spouse in Conveyance of Land.** — Where there is a homestead right in land, the homesteader may alienate the same only with the joinder of the wife (spouse). Farris v. Hendricks, 196 N.C. 439, 146 S.E. 73 (1929).

A deed executed by the homesteader without the joinder of his wife (spouse) is invalid and passes no interest. Wittkowsky v. Gidney, 124

N.C. 437, 32 S.E. 731 (1899). See also, Lambert v. Kinnery, 74 N.C. 348 (1876).

**For case discussing right of grantee upon nonjointure of wife (spouse),** see Dalrymple v. Cole, 170 N.C. 102, 86 S.E. 988 (1915).

**For case discussing instances in which the assent of the wife (spouse) was not necessary,** see Hughes v. Hodges, 102 N.C. 236, 102 N.C. 262, 9 S.E. 437, 9 S.E. 437 (1889). See also, Dalrymple v. Cole, 156 N.C. 353, 72 S.E. 451 (1911); Simmons v. McCullin, 163 N.C. 409, 79 S.E. 625 (1913).

**General power of alienation incident to ordinary ownership of real property exists as to all the residue** or remaining interest in the lands over the homestead exemption, whether the exemption has or has not been allotted, this section of the Constitution applying alone to the homestead interest, and none other. Davenport v. Fleming, 154 N.C. 291, 70 S.E. 472 (1911).

**For case holding jointure of wife (spouse) unnecessary in conveyance of estate in reversion,** see Jenkins v. Bobbitt, 77 N.C. 385 (1877).

**Land Acquired Prior to 1868.** — Husband could convey land acquired before the Constitution of 1868 without the joinder of his wife and thereby bar wife of dower or homestead. Cawfield v. Owens, 129 N.C. 286, 40 S.E. 62 (1901).

**For review of decisions prior and subsequent to enactment, in 1905, of former G.S. 1-370,** see Stokes v. Smith, 246 N.C. 694, 100 S.E.2d 85 (1957).

## Sec. 3. Mechanics' and laborers' liens.

The General Assembly shall provide by proper legislation for giving to mechanics and laborers an adequate lien on the subject-matter of their labor. The provisions of Sections 1 and 2 of this Article shall not be so construed as to prevent a laborer's lien for work done and performed for the person claiming the exemption or a mechanic's lien for work done on the premises.

**Cross References.** — As to statutory liens and charges, see G.S. 44A-1 et seq.

**History.** — The provisions of the first sentence of this section are similar to those of Art. XIV, § 4, Const. 1868. The provisions of the second sentence of this section are similar to those of Art. X, § 4, Const. 1868.

**Legal Periodicals.** — For article on "North Carolina Construction Law Survey II," see 22 Wake Forest L. Rev. 481 (1987).

### CASE NOTES

***Editor's Note.*** — *Some of the cases cited below were decided under former Art. XIV, § 4; Const. 1868, and former Art. X, § 4, Const. 1868.*

**Definition of Terms.** — A "laborer's lien" is solely for labor performed, while a "mechanic's lien" is broader and includes the "work done," i.e., the "building built" or superstructure put on the premises. Broyhill v. Gaither, 119 N.C. 443, 26 S.E. 31 (1896).

**Adequate Lien for Subcontractors and Suppliers of Materials and Labor.** — Appellate court erred in reversing the trial court's grant of summary judgment to the product supplier that found the product supplier was entitled to judgment in the amount specified in its notice of lien sent to the manufacturer; the state constitution and statutory law provided that a materialman was entitled to an adequate lien on the subject matter of the materials supplied, the product supplier sent a notice of lien for a certain amount to the manufacturer after the product supplier became aware that the contractor with whom the manufacturer had contracted was having financial difficulties, and the manufacturer nevertheless paid the contractor, instead of the product supplier, shortly before the contractor went bankrupt. O & M Indus. v. Smith Eng'g Co., 360 N.C. 263, 624 S.E.2d 345, 2006 N.C. LEXIS 6 (2006).

**This section is a mandate** directing the General Assembly to enact legislation to give mechanics and laborers a lien on the subject matter of their labor. American Bridge Div. v. Brinkley, 255 N.C. 162, 120 S.E.2d 529 (1961).

**Liens on Public Construction Prohibited.** — Public policy prohibits the acquisition of liens for labor or materials used or furnished in the construction of a public edifice or way. American Bridge Div., United States Steel Corp. v. Brinkley, 255 N.C. 162, 120 S.E.2d 529 (1961).

**As to lien for materials furnished,** see Cumming v. Bloodworth, 87 N.C. 83 (1882); Broyhill v. Gaither, 119 N.C. 443, 26 S.E. 31 (1896).

**Lien on Property of Married Woman.** — For all debts contracted for work and labor done, a lien is given upon the property of a married woman. Ball v. Paquin, 140 N.C. 83, 52 S.E. 410, 3 L.R.A. (n.s.) 307 (1905).

**Cited** in Floyd S. Pike Elec. Contractor v.

Goodwill Missionary Baptist Church, 25 N.C. App. 563, 214 S.E.2d 276 (1975); Wilbur Smith & Assocs. v. South Mt. Properties, Inc., 29 N.C. App. 447, 224 S.E.2d 692 (1976).

## Sec. 4. Property of married women secured to them.

The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed and conveyed by her, subject to such regulations and limitations as the General Assembly may prescribe. Every married woman may exercise powers of attorney conferred upon her by her husband, including the power to execute and acknowledge deeds to property owned by herself and her husband or by her husband.

**Cross References.** — As to conveyances by husband and wife, see G.S. 39-7 et seq. As to powers and liabilities of married persons, see G.S. 52-1 et seq.

**History.** — The provisions of this section are similar to those of Art. X, § 6, Const. 1868, as amended in 1956 and 1964.

**Legal Periodicals.** — For note on wife's conveyance of her realty by virtue of husband's power of attorney, see 31 N.C.L. Rev. 228 (1953).

For note on constitutionality of husband's right to dissent from wife's will, see 41 N.C.L. Rev. 311 (1963).

For comment as to whether North Carolina really has a homestead exemption, see 2 Wake Forest Intra. L. Rev. 53 (1966).

For comment on the constitutionality of the privy examination under G.S. 52-6(a) (now repealed) and its relation to this section, see 12 Wake Forest L. Rev. 1007 (1977).

For comment on tenancy by the entirety in North Carolina, see 59 N.C.L. Rev. 997 (1980).

For article analyzing North Carolina's tenancy by the entirety reform legislation of 1982, see 5 Campbell L. Rev. 1 (1982).

For comment on the tax effects of equitable distribution upon divorce, see 18 Wake Forest L. Rev. 555 (1982).

For comment discussing the status of the presumption of purchase money resulting trust for wives in light of Mims v. Mims, 305 N.C. 41, 286 S.E.2d 779 (1982), see 61 N.C.L. Rev. 576 (1983).

For article, “A Spouse's Right to Control Assets During Marriage: Is North Carolina Living in the Middle Ages?”, see 18 Campbell L. Rev. 203.

### CASE NOTES

***Editor's Note.*** — *Most of the cases cited below were decided under former Art. X, § 6, Const. 1868, before and after amendment. In addition, these cases were decided prior to the repeal of §§ 30-1 to 30-3, relating to the right of a surviving spouse to dissent from the will of the deceased spouse, and the enactment of § 30-3.1 et seq., relating to the right to claim an elective share.*

**As to the history of this section,** see Perry v. Stancil, 237 N.C. 442, 75 S.E.2d 512 (1953).

**General Policy of Section.** — This section is intended to emancipate married women and place them, so far as property rights are concerned, on a par with men and femmes sole. McLeod v. Williams, 122 N.C. 451, 30 S.E. 129 (1898).

There is no “beneficent provision of the Constitution” which throws additional shackles around women in the management of their separate property. This provision of the Constitution is in exactly the opposite direction, in accordance with the free spirit of the age and with the universal trend of legislation the world over. Its purpose is not to further assimilate married women to the condition of infants, but to make free women of them, to emancipate them from most of the restrictions formerly existing. Strouse v. Cohen, 113 N.C. 349, 18 S.E. 323 (1893).

The historical context of this Article makes clear that wives were simply accorded rights in their property similar to those rights husbands already enjoyed in their own property. Armstrong v. Armstrong, 85 N.C. App. 93, 354 S.E.2d 350 (1987), rev'd on other grounds, 322 N.C. 396, 368 S.E.2d 595 (1988).

**Purpose to Give Wives Same Rights as Husbands.** — The historical context of this Article makes clear that wives were simply accorded rights in their property similar to those rights husbands already enjoyed in their own property. Armstrong v. Armstrong, 85 N.C. App. 93, 354 S.E.2d 350 (1987), rev'd on other grounds, 322 N.C. 396, 368 S.E.2d 595 (1988).

**Section Subject to Limitation Prescribed by General Assembly.** — Whatever the remedial purpose of this section, it is by its own terms subject to limitations prescribed by the General Assembly, including any statutory classification and distribution of property under the Equitable Distribution Act. Under G.S. 50-20(b) of that Act, military retirement pay is treated no differently, whether its recipient is male or female. Armstrong v. Armstrong, 85 N.C. App. 93, 354 S.E.2d 350 (1987), rev'd on other grounds, 322 N.C. 396, 368 S.E.2d 595 (1988).

**Common-Law Rule Changed.** — The common-law rule giving to the husband the actual or potential ownership of the separate choses in action belonging to his wife by reducing them into possession is now changed by this section giving to the wife the sole ownership of her separate estate. Turlington v. Lucas, 186 N.C. 283, 119 S.E. 366 (1923).

By virtue of this section and other provisions, the relation which married women formerly sustained to their husbands has been materially modified. Unity of person in the strict common-law sense no longer exists, and many of the common-law disabilities have been removed. Not only may they contract with each other; a married woman may now sue her husband in contract or in tort. Etheredge v. Cochran, 196 N.C. 681, 146 S.E. 711 (1929); Dorsett v. Dorsett, 183 N.C. 354, 111 S.E. 541, 23 A.L.R. 15 (1922); Roberts v. Roberts, 185 N.C. 566, 118 S.E. 9, 29 A.L.R. 1479 (1923); Shirley v. Ayers, 201 N.C. 51, 158 S.E. 840 (1931).

This section completely abolished the general doctrine of the common law that as to property husband and wife are in legal contemplation but one person, and that the husband is that one, and made very material and far-reaching changes as to the rights respectively of husband and wife in respect to the wife's property, both real and personal, and enlarged the wife's power in respect to and control over her property. Dudley v. Staton, 257 N.C. 572, 126 S.E.2d 590 (1962), commented on in 91 N.C.L. Rev. 311 (1963).

**Purpose of 1964 Amendment.** — The 1964 amendment to this section was enacted to abrogate the effect of the decision in Dudley v. Staton, 257 N.C. 572, 126 S.E.2d 590 (1962) and to make the rights of husbands and wives the same in each other's separate property. Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967).

**Statutes allowing husband to dissent from wife's will violated section prior to 1964 amendment.** Dudley v. Staton, 257 N.C. 572, 126 S.E.2d 590 (1962), commented on in 41 N.C.L. Rev. 311 (1963); Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967).

**And Wife Could Bar Husband's Curtesy by Devising Property.** — By marriage, before the adoption of the Constitution of 1868, the husband acquired no vested rights in the lands of his wife before a child was born capable of inheriting; and when the first child of the marriage was born after the adoption of the Constitution of 1868, which gave a married woman the power, among other things, of disposing, by will, of her property acquired before marriage, she could accordingly dispose of it by will and deprive her husband of his interest therein as tenant by the curtesy. Richardson v. Richardson, 150 N.C. 549, 64 S.E. 510 (1909).

Under the Constitution of 1868 there was no curtesy after the death of the wife in property which she had devised. Tiddy v. Graves, 127 N.C. 502, 37 S.E. 513 (1900); Dudley v. Staton, 257 N.C. 572, 126 S.E.2d 590 (1962), comment on in 41 N.C.L. Rev. 311 (1963).

The common-law estate of the husband as tenant by the curtesy initiate in the lands of his wife was abolished by Art. X, § 6, Const. 1868. Walker v. Long, 109 N.C. 510, 14 S.E. 299 (1890); Dudley v. Staton, 257 N.C. 572, 126 S.E.2d 590 (1962), commented on in 41 N.C.L. Rev. 311 (1963).

**But vested curtesy rights of husband at adoption of the Constitution of 1868 were not impaired.** Richardson v. Richardson, 150 N.C. 549, 64 S.E. 510 (1909).

**Amendment of 1964 Restored Husband's Right to Dissent.** — The effect of the adoption by the voters of the 1964 amendment to this section was to restore, subject to the qualifications set forth in Session Laws 1963, c. 1209, the right of the husband to dissent from the will of his wife. Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967).

**And Dissent Could Be Based on Anticipatory Legislation Prior to Amendment.** — Where, at the time of his wife's death in 1965, the amendment to this section authorizing the legislature to empower a husband to dissent from his wife's will had been certified but the legislation reenacting former G.S. 30-1, 30-2, and 30-3 had not become effective, the husband had a right to dissent from his wife's will based on anticipatory provisions of Session Laws 1963, c. 1209, which directed the submission of the constitutional amendment, and which provided that the word "spouse" should apply to both husband and wife in certain statutes. Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967).

**Legislative Control over Capacity to Make Will.** — This section, conferring upon married women the right to make a will, etc., was designed chiefly to remove the common-law restriction on married women in this respect, and was not intended to free such right from every and all legislative regulation.

Flanner v. Flanner, 160 N.C. 126, 75 S.E. 936 (1912).

**Trust for sole use and benefit of married woman** held passive, in view of this section. Pilkington v. West, 246 N.C. 575, 99 S.E.2d 798 (1957).

**Devise of Equitable Separate Estate.** — A married woman may devise her equitable separate estate, in the absence of contrary provisions in the instrument creating it, where the trustee is a passive trustee; and, whether the trust be passive or active, where the trust is to terminate with her life, and the estate to become absolute thereafter. Freeman v. Lide, 176 N.C. 434, 97 S.E. 402 (1918).

**Provisions of Instrument Creating Estate Still Control.** — Married women have no greater estates, by operation of this section of the Constitution, than those conveyed by the terms of the deed under which they derive title; nor are the properties and incidents belonging to estates changed by that instrument. Long v. Barnes, 87 N.C. 329 (1882).

The Constitution imposes no limitation upon the right of a grantor or devisor to restrict or enlarge, by the terms of the instrument through which title passes, married woman's jus disponendi. Kirby v. Boyette, 118 N.C. 244, 24 S.E. 18 (1896).

**Marriage Does Not Sever Unity of Title and Possession Under Joint Tenancy.** — Where a deed of bargain and sale conveys a joint tenancy in the grantees with right of survivorship, the subsequent marriage of one of the grantees does not sever the unity of title and possession. Vettori v. Fay, 262 N.C. 481, 137 S.E.2d 810 (1964).

**Estates by entireties are not changed or affected by this section.** Moore v. Shore, 208 N.C. 446, 181 S.E. 275 (1935), citing Bank of Greenville v. Gornto, 161 N.C. 341, 77 S.E. 222 (1913).

**Lien Against Land Held by Entireties.** — Estates by entireties as between husband and wife still exist in North Carolina, but where there is a judgment upon a joint contract against husband and wife, a lien thereunder is created against lands held by them in entireties, and execution may be issued against them. Martin v. Lewis, 187 N.C. 473, 122 S.E. 180 (1924).

**Conveyance, etc., of Land Held by Entireties.** — The husband has the right, during coverture, to deal with the possession of land held by him and his wife by entireties without the consent of the wife, but neither may make a contract affecting title so as to defeat the right of the survivor in the whole estate without the consent of the other. Moore v. Shore, 208 N.C. 446, 181 S.E. 275 (1935).

Where lots are conveyed with restrictive covenants limiting buildings to residences, and one of such lots is owned by husband and wife by the entireties, husband may not convey or contract in respect to the negative easement of such lot over the other lots without the consent of his wife, since the wife has the right to such negative easement as a part of the estate if she should survive her husband. Moore v. Shore, 208 N.C. 446, 181 S.E. 275 (1935).

**Conveyances Between Husband and Wife.** — While a deed executed by husband to wife in 1841, even if a fee simple deed, would have been void in law, and sustainable in equity only upon meritorious consideration, it is otherwise as to such deed executed now, which is rendered valid under this section. McLamb v. McPhail, 126 N.C. 218, 35 S.E. 426 (1900).

**As to former requirement of husband's written assent to wife's conveyance,** see Jennings v. Hinton, 126 N.C. 48, 35 S.E. 187 (1900); Coffin v. Smith, 128 N.C. 252, 38 S.E. 864 (1901); Vann v. Edwards, 135 N.C. 661, 47 S.E. 784 (1904); Smith v. Bruton, 137 N.C. 79, 49 S.E. 64 (1904); Freeman v. Lide, 176 N.C. 434, 97 S.E. 402 (1918); Joiner v. Firemen's Ins. Co., 6 F. Supp. 103 (M.D.N.C. 1934); Martin v. Bundy, 212 N.C. 437, 193 S.E. 831 (1937); Nichols v. York, 219 N.C. 262, 13 S.E.2d 565 (1941); Buford v. Mochy, 224 N.C. 235, 29 S.E.2d 729 (1944); Perkins v. Isley, 224 N.C. 793, 32 S.E.2d 588 (1945); Merchants & Farmers Bank v. Sherrill, 231 N.C. 731, 58 S.E.2d 741 (1950); Perry v. Stancil, 237 N.C. 442, 75 S.E.2d 512 (1953); Dudley v. Staton, 257 N.C. 572, 126 S.E.2d 590 (1962), commented on in 41 N.C.L. Rev. 311 (1963).

**As to status of husband as freeholder where wife owned land and there were children,** see Hodgin v. Southern R.R., 143 N.C. 93, 55 S.E. 413 (1906); State v. Avant, 202 N.C. 680, 163 S.E. 806 (1932).

**Legislative Power to Declare Wife Free Trader.** — There is no constitutional inhibition on the power of the legislature to declare where and how the wife may become a free trader, this section being intended to protect and not to disable her. Hall v. Walker, 118 N.C. 377, 24 S.E. 6 (1896); Dudley v. Staton, 257 N.C. 572, 126 S.E.2d 590 (1962), commented on in 41 N.C.L. Rev. 311 (1963).

**Liability of Husband for Rents Paid Wife after Foreclosure.** — Where lands belonging to the separate estate of a wife were foreclosed under a deed of trust thereon duly executed, and after such foreclosure the rents from the land were paid to the wife, the husband could not be held responsible for such rents by the person entitled thereto by virtue of the foreclosure, since under this section a wife is given sole ownership of her separate estate. In re Longley, 205 N.C. 488, 171 S.E. 788 (1933).

**Liability of Wife as Surety to Husband.** — This section, providing that the separate property of the wife shall not be liable for the debts of the husband, has no application to the obligation of the wife as surety of her husband, such obligation being regarded as a direct one between the creditor and herself. Royal v. Southerland, 168 N.C. 405, 84 S.E. 708 (1915).

**Action for Tort to Spouse.** — Husband cannot sue to recover his wife's earnings or damages for torts committed on her, and there is no reason why wife can sue for torts or injuries inflicted on her husband. The law has never authorized the wife to maintain such action for torts sustained by the husband. If the husband could maintain an action to recover damages for torts on his wife, she would be able to maintain an action on account of torts sustained by her husband. Such right of action, if it existed in favor of the husband, should exist in favor of the wife. It should be in favor of both, or neither, but in view of the Constitution of 1868 and the statute on the subject, such action cannot be maintained by either on account of the injury to the other. Hipp v. E.L. Dupont de Nemours & Co., 182 N.C. 9, 108 S.E. 318 (1921).

**Tort Action Against Spouse.** — The right of a married woman to maintain an action against her husband to recover for negligent injury is not limited to residents of this State, but a nonresident wife may maintain an action here against her nonresident husband on a transitory cause of action which arises in this State, and she is entitled to any recovery as her separate property. Bogen v. Bogen, 219 N.C. 51, 12 S.E.2d 649 (1941).

**Power to Contract.** — Contention that when the Constitution gave married women separate estates in their property, it gave them by necessary implication an unrestricted dominion over the property, to bind it directly or indirectly, except when expressly forbidden, and an unrestricted right to contract, such as a feme sole or a man has, would be rejected on grounds that no such grant was implied, that the terms "sole and separate estate" had a known and definite meaning in the law when the Constitution was framed, and that it would be taken that they were used in that instrument in the sense which had been affixed to them by prior decisions of the court. Pippen v. Wesson, 74 N.C. 437 (1876). But see now G.S. 52-2.

**Cited** in Spencer v. Spencer, 37 N.C. App. 481, 246 S.E.2d 805 (1978); Murphy v. Davis, 61 N.C. App. 597, 300 S.E.2d 871 (1983); White v. White, 312 N.C. 770, 324 S.E.2d 829 (1985); Armstrong v. Armstrong, 322 N.C. 396, 368 S.E.2d 595 (1988); Dunn v. Pate, 334 N.C. 115, 431 S.E.2d 178 (1993).

### OPINIONS OF ATTORNEY GENERAL

**The requirement that an equitable distribution of property must follow a decree of absolute divorce** is statutory and not constitutional. See Opinion of Attorney General to The Honorable Henson P. Barnes, North Carolina Senate, 57 N.C.A.G. 30 (1987).

## Sec. 5. Insurance.

A person may insure his or her own life for the sole use and benefit of his or her spouse or children or both, and upon his or her death the proceeds from the insurance shall be paid to or for the benefit of the spouse or children or both, or to a guardian, free from all claims of the representatives or creditors of the insured or his or her estate. Any insurance policy which insures the life of a person for the sole use and benefit of that person's spouse or children or both shall not be subject to the claims of creditors of the insured during his or her lifetime, whether or not the policy reserves to the insured during his or her lifetime any or all rights provided for by the policy and whether or not the policy proceeds are payable to the estate of the insured in the event the beneficiary or beneficiaries predecease the insured. (1977, c. 115, s. 1.)

**History.** — The provisions of this section are similar to those of Art. X, § 7, Const. 1868, as amended in 1932.

**Legal Periodicals.** — For article on debtors' exemption rights under the Bankruptcy Reform Act, see 58 N.C.L. Rev. 769 (1980).

For article on the rights of individuals to control the distributional consequences of divorce by private contract and on the interests of the State in preserving its role as a third party to marriage and divorce, see 59 N.C.L. Rev. 819 (1981).

### CASE NOTES

*Editor's Note. — Most of the cases cited below were decided under former Art. X, § 7, Const. 1868, before and after amendment.*

**Purpose.** — The purpose of this section is to enable the husband (spouse) to make valuable provision for his wife (spouse) and children after his death, above, beyond and unaffected by his estate, personal and real, and the conditions of the same remaining at the time of his death. Burwell v. Snow, 107 N.C. 82, 11 S.E. 1090 (1890).

**Certain Insurance Proceeds Not Part of Insured's Estate.** — Where a life insurance policy is issued to an individual in the name and for the benefit of the wife (spouse) and children, it does not upon his death become a part of his estate. Burton v. Farinholt, 86 N.C. 260 (1882).

Under this section the proceeds from insurance policy payable to the wife (spouse) and children are not a part of the insured's estate so that they may be claimed by an heir or next of kin. Burwell v. Snow, 107 N.C. 82, 11 S.E. 1090 (1890).

Wives (spouses) and children of bankrupts are protected from claims of the bankrupt's creditors, both during his life and at his death, if life insurance policies are for their sole benefit. In re Wolfe, 249 F. Supp. 784 (M.D.N.C. 1966), commented on in 45 N.C.L. Rev. 696 (1967).

**Protection Is Personal to Survivors.** — This section clearly looks to provision for the wife (spouse) and children so that they may not be left destitute by the death of an insolvent husband and father (spouse and parent) and is personal to them when they survive. Hooker v. Sugg, 102 N.C. 115, 8 S.E. 919 (1889).

**Treatment of Insurance Proceeds When Received by Beneficiary.** — Upon filing a bankruptcy petition, a debtor can claim as exempt the value of life insurance policy. There is no provision, however, that extends the protection of the life insurance exemption to the beneficiary of the policy once the proceeds are in the beneficiary's hands. The proceeds are treated like any other asset of the beneficiary and are available to his creditors, except to the extent that an exemption or other protection is available to the beneficiary in his own right under applicable law. The result is no different where the beneficiary is the codebtor of the insured in a joint bankruptcy case. Butler v. Sharik, 41 Bankr. 388 (Bankr. E.D.N.C. 1984).

**Applied** in First Nat'l Bank v. Dixon, 38 N.C. App. 430, 248 S.E.2d 416 (1978).

**Cited** in In re Ragan, 64 Bankr. 384 (Bankr. E.D.N.C. 1986); HFC v. Ellis, 107 N.C. App. 262, 419 S.E.2d 592 (1992), cert. granted, 333 N.C. 167, 424 S.E.2d 909 (1992).

# ARTICLE XI

# PUNISHMENTS, CORRECTIONS, AND CHARITIES

## Section 1. Punishments.

The following punishments only shall be known to the laws of this State: death, imprisonment, fines, suspension of a jail or prison term with or without conditions, restitution, community service, restraints on liberty, work programs, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this State. (1995, c. 429, s. 2.)

**History.** — The provisions of this section are similar to those of the first sentence of Art. XI, § 1, Const. 1868, as amended by the Convention of 1875.

**Editor's Note.** — The amendments to this section by Session Laws 1995, c. 429, s. 3, were submitted to the qualified voters of the State at the general election in November 1996 and were approved by the voters at that election. Session Laws 1995, c. 429, s. 4, provided that the amendments were effective upon certification by the State Board of Elections to the Secretary of State; certification was made on November 26, 1996.

**Legal Periodicals.** — For article on punishment for crime in North Carolina, see 17 N.C.L. Rev. 205 (1939).

For article, "Sentencing Due Process: Evolving Constitutional Principles," see 18 Wake Forest L. Rev. 523 (1982).

## CASE NOTES

***Editor's Note.** — Some of the cases cited below were decided under former Art. XI, § 1, Const. 1868, as amended.*

**The courts may impose only such punishments as are authorized** by this section. State v. Cole, 241 N.C. 576, 86 S.E.2d 203 (1955).

**Section Limits Remedial Creativity.** — This provision, in effect since 1868, was intended to stop the use of degrading punishments theretofore inflicted, but as a necessary consequence it also limited the creativity of trial judges in fashioning remedies for crime. Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976).

**Conditional Suspension of Punishment.** — As a consequence of the desire for more diverse responses to criminal behavior, the practice developed to suspend a constitutionally designated punishment with the consent of defendant upon his performance of conditions. And so long as these conditions are otherwise constitutional, related to the purposes of punishment, and otherwise reasonable they need not be limited to the type of punishment prescribed by this provision. Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976).

**The Constitution forbids both ignominious burial and forfeiture of estates** as punishment for crime. State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961).

**Fines as Constitutional Punishment.** — Fines are a pecuniary punishment extracted by the State. They are a permitted form of punishment under the state constitution. Florence v. Hiatt, 101 N.C. App. 539, 400 S.E.2d 118 (1991).

**No Contact With Victims.** — Sentence provision which precluded defendant from having any contact with the victims did not violate N.C. Const. art. XI, § 1, as the no contact recommendation was not a mandatory and binding part of the judgment, but rather, much like an order of restitution; furthermore, it constituted a recommendation to the Secretary of the Department of Correction and the Parole Commission, not an order binding defendant upon entry of the judgment, as neither the Parole Commission nor the Department of Correction was bound by the judge's recommendation. State v. Curmon, 171 N.C. App. 697, 615 S.E.2d 417, 2005 N.C. App. LEXIS 1362 (2005).

**Suicide may not be punished in North Carolina.** State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961).

**But the criminal character of the act of suicide is not changed.** State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961).

The Constitution and statutes have repealed and abrogated the common law as to suicide only as to punishment and possibly the quality of the offense. State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961).

**An attempt to commit suicide is an indictable misdemeanor** in this State. State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961).

**Authority to Establish Prison System.** — Under the provisions of this Article, the General Assembly has plenary authority to provide for a State prison system. Pharr v. Garibaldi, 252 N.C. 803, 115 S.E.2d 18 (1960).

**This section has no direct application to the discipline required in jails and penitentiaries,** for if so it would prevent solitary confinement, restriction of rations, and other reasonable punishments that are in customary use in prisons and penitentiaries. State v. Nipper, 166 N.C. 272, 81 S.E. 164 (1914).

**But officers are civilly and criminally liable for abuse or oppression** of the adopted regulations under which convicts are kept. State v. Young, 138 N.C. 571, 50 S.E. 213 (1905).

**Regulations Governing Prisoners Must Be Reasonable.** — Whether prisoners are worked on the public road or kept in jail, the regulations under which they must live must be reasonable. State v. Young, 138 N.C. 571, 50 S.E. 213 (1905).

**Right and Duty of Prosecuting Attorney to Seek Death Penalty.** — Where the grand jury, after investigation according to law, indicted defendant for murder in the first degree, and prosecuting attorney, after investigation, determined, on behalf of the State, that defendant should be tried for this offense, and that the death penalty should be sought, these determinations having been made on behalf of the State, it was the right and duty of the prosecuting attorney, vigorously, but fairly and in accordance with law, both in the presentation of evidence and in his argument, to seek that result. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

**The term "life imprisonment without parole"** falls within the meaning of the constitutional term "imprisonment," so the sentence was authorized by the Constitution. State v. Allen, 346 N.C. 731, 488 S.E.2d 188 (1997).

**Cited** in State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974); Henry v. Edmisten, 315 N.C. 474, 340 S.E.2d 720 (1986).

## Sec. 2. Death punishment.

The object of punishments being not only to satisfy justice, but also to reform the offender and thus prevent crime, murder, arson, burglary, and rape, and these only, may be punishable with death, if the General Assembly shall so enact.

**Cross References.** — As to punishment for murder, see G.S. 14-17. As to punishment for rape, see G.S. 14-27.2 and 14-27.3. As to punishment for burglary, see G.S. 14-52. As to punishment for arson, see G.S. 14-58. As to burning of buildings other than dwelling houses, see G.S. 14-59 et seq.

**History.** — The provisions of this section are similar to those of Art. XI, § 2, Const. 1868.

**Legal Periodicals.** — For symposium address on the death penalty in North Carolina, see 8 Campbell L. Rev. 1 (1985).

For article, "Prosecutorial Abuse of Peremptory Challenges in Death Penalty Litigation: Some Constitutional and Ethical Considerations," see 8 Campbell L. Rev. 71 (1985).

For note, "Arbitrariness and the Death Penalty in an International Context", see 45 Duke L.J. 611 (1995).

### CASE NOTES

***Editor's Note.*** *— Some of the cases cited below were decided under former Art. XI, § 2, Const. 1868.*

**Discretion of Legislature.** — The punishment to be inflicted for any crime is left entirely to the General Assembly, which may in its discretion affix lesser punishments, even for the four crimes mentioned in this section. State v. Lytle, 138 N.C. 738, 51 S.E. 66 (1905).

**Imposition of the death penalty upon a conviction of murder is expressly authorized by this section.** State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969), judgment rev'd insofar as it imposed the death sentence, 403 U.S. 948, 91 S. Ct. 2283, 29 L. Ed. 2d 859 (1971).

**For case holding that imposition of death penalty upon conviction of rape is not unconstitutional per se,** see State v. Yoes, 271 N.C. 616, 157 S.E.2d 386 (1967).

**For discussion of former statute prescribing punishment of death for burning millhouse,** see State v. King, 69 N.C. 419 (1873).

**Applied** in State v. Jones, 290 N.C. 292, 225 S.E.2d 549 (1976).

**Cited** in State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974).

## Sec. 3. Charitable and correctional institutions and agencies.

Such charitable, benevolent, penal, and correctional institutions and agencies as the needs of humanity and the public good may require shall be established and operated by the State under such organization and in such manner as the General Assembly may prescribe.

**History.** — This section is new with the Constitution of 1970.

### CASE NOTES

**Obligation of County to Pay for Health Care of Indigent Sick.** — A county does not have an obligation, under this section and N.C. Const., Art. XI, § 4, to pay for hospital care for its indigent residents. In the absence of a delegation by the State to the counties of the obligation to pay the costs of medical care of the indigent sick, such obligation is that of the State. Craven County Hosp. Corp. v. Lenoir County, 75 N.C. App. 453, 331 S.E.2d 690, cert. denied, 314 N.C. 663, 336 S.E.2d 620 (1985).

## Sec. 4. Welfare policy; board of public welfare.

Beneficent provision for the poor, the unfortunate, and the orphan is one of the first duties of a civilized and a Christian state. Therefore the General Assembly shall provide for and define the duties of a board of public welfare.

**History.** — The provisions of this section are similar to those of Art. XI, § 7, Const. 1868.

**Legal Periodicals.** — For article, "The Obligation of North Carolina Municipalities and Hospital Authorities to Provide Uncompensated Hospital Care to the Medically Indigent," see 20 Wake Forest L. Rev. 317 (1984).

For article discussing the rise and decline of North Carolina Abortion Fund, see 22 Campbell L. Rev. 119 (1999).

### CASE NOTES

***Editor's Note.*** *— Some of the cases cited below were decided under former Art. XI, G.S. 7, Const. 1868.*

**Duty of State to Furnish Medical Care to Indigent Sick, etc.** — The obligation to pay the cost of medical care of the indigent sick and afflicted poor rests, under this section, upon the State. Board of Managers v. City of Wilmington, 237 N.C. 179, 74 S.E.2d 749 (1953).

**Delegation of Duty to Counties, etc.** — In accordance with the express constitutional declaration of this section, the care of the indigent sick and afflicted poor is a proper function of the State government, and the General Assembly may by statute require the counties, as administrative agencies of the State, to perform this function, at least within their territorial limits. Martin v. Board of Comm'rs, 208 N.C. 354, 180 S.E. 777 (1935).

The General Assembly may by statute delegate a portion of its sovereignty to the governing body of any town or city or county, separately or jointly, who, when they deem it for the best interest of the town or city or county, may contract with hospitals for the medical treatment and hospitalization of the sick and afflicted poor of the town or city or county within their territorial limits. Board of Managers v. City of Wilmington, 237 N.C. 179, 74 S.E.2d 749 (1953).

**Obligation of County to Pay for Health Care of Indigent Sick.** — A county does not have an obligation, under N.C. Const., Art. XI, § 3 and this section, to pay for hospital care to its indigent residents. In the absence of a delegation by the State to the counties of the obligation to pay the costs of medical care of the indigent sick, such obligation is that of the State. Craven County Hosp. Corp. v. Lenoir County, 75 N.C. App. 453, 331 S.E.2d 690, cert. denied, 314 N.C. 663, 336 S.E.2d 620 (1985).

**Restrictions on Funding Medically Necessary Abortions for Indigent Women.** — The action of the General Assembly in placing severe restrictions on the funding of medically necessary abortions for indigent women is valid and does not violate Article I, Section 1; Article 1, Section 19; or Article XI, Section 4 of the Constitution of North Carolina. Rosie J. v. North Carolina Dep't of Human Resources, 347 N.C. 247, 491 S.E.2d 535 (1997).

**There is no contractual duty on the part of the State to care for and maintain the mentally ill,** the State hospitals being charitable institutions of the State, maintained voluntarily. State ex rel. State Hosp. v. Security Nat'l Bank, 207 N.C. 697, 178 S.E. 487, cert. denied, 295 U.S. 761, 55 S. Ct. 921, 79 L. Ed. 1704 (1935).

**County Home.** — The building of a county home is for a class of citizens without a place of residence, beneficent provision for whom is recommended by this section; therefore, a county may pledge its faith and credit and issue valid bonds for that purpose, without the approval of its voters. Board of Comm'rs v. Sidney Spitzer & Co., 173 N.C. 147, 91 S.E. 707 (1917).

Under this section a county may build a county home for the poor without the approval of the voters. Board of Managers v. City of Wilmington, 237 N.C. 179, 74 S.E.2d 749 (1953).

**Cited** in Vaughn v. Durham County Dep't of Social Servs., 34 N.C. App. 416, 240 S.E.2d 456 (1977); Casey v. Wake County, 45 N.C. App. 522, 263 S.E.2d 360 (1980); State of W.Va. ex rel. K. M. v. W.Va. Dep't of Health & Human Res., 212 W. Va. 783, 575 S.E.2d 393, 2002 W. Va. LEXIS 241 (2002).

# ARTICLE XII

# MILITARY FORCES

## Section 1. Governor is Commander in Chief.

The Governor shall be Commander in Chief of the military forces of the State and may call out those forces to execute the law, suppress riots and insurrections, and repel invasion.

**History.** — The provisions of this section are similar to those of Art. XII, § 3, Const. 1868.

### CASE NOTES

**Governor May Call Out Militia.** — In the absence of legislation, the Governor, as commander-in-chief, has the power to call out the militia, and the State guard being made a part of the militia, he has the power to call them out. This constitutional power may be regulated by legislation providing what shall amount to sufficient evidence of the existence of the causes mentioned in this section. Worth v. Commissioners of Craven County, 118 N.C. 112, 24 S.E. 778 (1896), decided under former Art. XII, § 3, Const. 1868.

**The legislature has no authority to restrict the power of the Governor to call out the militia.** Worth v. Commissioners of Craven County, 118 N.C. 112, 24 S.E. 778 (1896), decided under former Art. XII, § 3, Const. 1868.

**Officers in the militia are liable to be called out** to suppress riots or insurrection, "and to repel invasion." In re Yelton, 223 N.C. 845, 28 S.E.2d 567 (1944), decided under former Art. XII, § 3, Const. 1868.

# ARTICLE XIII

# CONVENTIONS; CONSTITUTIONAL AMENDMENT AND REVISION

## Section 1. Convention of the People.

No Convention of the People of this State shall ever be called unless by the concurrence of two-thirds of all the members of each house of the General Assembly, and unless the proposition "Convention or No Convention" is first submitted to the qualified voters of the State at the time and in the manner prescribed by the General Assembly. If a majority of the votes cast upon the proposition are in favor of a Convention, it shall assemble on the day prescribed by the General Assembly. The General Assembly shall, in the act submitting the convention proposition, propose limitations upon the authority of the Convention; and if a majority of the votes cast upon the proposition are in favor of a Convention, those limitations shall become binding upon the Convention. Delegates to the Convention shall be elected by the qualified voters at the time and in the manner prescribed in the act of submission. The Convention shall consist of a number of delegates equal to the membership of the House of Representatives of the General Assembly that submits the convention proposition and the delegates shall be apportioned as is the House of Representatives. A Convention shall adopt no ordinance not necessary to the purpose for which the Convention has been called.

**History.** — The provisions of the first two sentences of this section are similar to those of Art. XIII, § 1, Const. 1868, as amended by the Convention of 1875.

**Legal Periodicals.** — For discussion as to whether this section applies to the calling of a Convention to consider a proposed federal amendment, see 11 N.C.L. Rev. 242 (1933).

CASE NOTES

**General Assembly may call a Convention to consider a proposed amendment to the United States Constitution,** either under this section or in the exercise of its plenary powers. See Opinions of Justices, 204 N.C. 806, 172 S.E. 474 (1933), decided under former Art. XIII, § 1, Const. 1868, as amended.

## Sec. 2. Power to revise or amend Constitution reserved to people.

The people of this State reserve the power to amend this Constitution and to adopt a new or revised Constitution. This power may be exercised by either of the methods set out hereinafter in this Article, but in no other way.

**History.** — This section is new with the Constitution of 1970.

**Legal Periodicals.** — For note on rejection of the "public purpose" requirement for State tax exemption, see 17 Wake Forest L. Rev. 293 (1981).

## Sec. 3. Revision or amendment by Convention of the People.

A Convention of the People of this State may be called pursuant to Section 1 of this Article to propose a new or revised Constitution or to propose amendments to this Constitution. Every new or revised Constitution and every constitutional amendment adopted by a Convention shall be submitted to the qualified voters of the State at the time and in the manner prescribed by the Convention. If a majority of the votes cast thereon are in favor of ratification of the new or revised Constitution or the constitutional amendment or amendments, it or they shall become effective January first next after ratification by the qualified voters unless a different effective date is prescribed by the Convention.

**History.** — This section is new with the Constitution of 1970.

## Sec. 4. Revision or amendment by legislative initiation.

A proposal of a new or revised Constitution or an amendment or amendments to this Constitution may be initiated by the General Assembly, but only if three-fifths of all the members of each house shall adopt an act submitting the proposal to the qualified voters of the State for their ratification or rejection. The proposal shall be submitted at the time and in the manner prescribed by the General Assembly. If a majority of the votes cast thereon are in favor of the proposed new or revised Constitution or constitutional amendment or amendments, it or they shall become effective January first next after ratification by the voters unless a different effective date is prescribed in the act submitting the proposal or proposals to the qualified voters.

**History.** — The provisions of this section are similar to those of Art. XIII, § 2, Const. 1868, as amended by the Convention of 1875.

**Legal Periodicals.** — For comment, "The States, Balanced Budgets, and Fundamental Shifts in Federalism," see 82 N.C.L. Rev. 1195 (2004).

### CASE NOTES

**Requirements for Constitutional Amendment.** — While to amend the Constitution of the State it is necessary for the voters to approve the proposed amendment to be submitted to them, it is likewise necessary to the validity of the election that the legislature enact the proposition to amend into a statute by a three-fifths vote of each branch. Reade v. City of Durham, 173 N.C. 668, 92 S.E. 712 (1917), decided under former Art. XIII, § 2, Const. 1868, as amended. See also, Freeman v. Cook, 217 N.C. 63, 6 S.E.2d 894 (1940), decided under former Art. XIII, § 2, Const. 1868, as amended.

**Date of Election.** — The General Assembly, at a special session in July, 1956, could provide for the holding prior to November, 1956, of a statewide election for the ratification or rejection of constitutional amendments. See Advisory Opinion in re General Election, 244 N.C. 748, 93 S.E.2d 853 (1956), decided under former Art. XIII, G.S. 2, Const. 1868, as amended.

# ARTICLE XIV

# MISCELLANEOUS

## Section 1. Seat of government.

The permanent seat of government of this State shall be at the City of Raleigh.

**History.** — The provisions of this section are similar to those of Art. XIV, § 6, Const. 1868, as amended in 1962.

## Sec. 2. State boundaries.

The limits and boundaries of the State shall be and remain as they now are.

**History.** — The provisions of this section are similar to those of Art. I, § 34, Const. 1868.

### OPINIONS OF ATTORNEY GENERAL

**Ambulatory Seaward Boundary Consistent with Constitution.** — While a proposal to permanently fix the seaward boundary for the State at specific coordinates would violate both G.S. 141-6(a), and this section, the acceptance of an ambulatory boundary, which merely represents the seaward boundary's location at a certain time, and moves with changes to the shoreline, whether by erosion, accretion or fill deposition, would be consistent with the Constitution and not require amendment of the statute; a reading of the State constitutional provision together with the statute and the case law reveal them to require that the eastern boundary always remain at distance of three geographical miles from the extreme low water mark. See opinion of Attorney General to Gary W. Thompson, Chief, North Carolina Geodetic Survey, 1998 N.C.A.G. 7 (2/11/98).

## Sec. 3. General laws defined.

Whenever the General Assembly is directed or authorized by this Constitution to enact general laws, or general laws uniformly applicable throughout the State, or general laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district, no special or local act shall be enacted concerning the subject matter directed or authorized to be accomplished by general or uniformly applicable laws, and every amendment or repeal of any law relating to such subject matter shall also be general and uniform in its effect throughout the State. General laws may be enacted for classes defined by population or other criteria. General laws uniformly applicable throughout the State shall be made applicable without classification or exception in every unit of local government of like kind, such as every county, or every city and town, but need not be made applicable in every unit of local government in the State. General laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district, shall be made applicable without classification or exception in every unit of local government, or in every local court district, as the case may be. The General Assembly may at any time repeal any special, local, or private act. (1969, c. 1200, s. 1.)

**History.** — The provisions of this section are similar to those of Art. IV, § 20, Const. 1868, as that article was rewritten in 1962.

**Legal Periodicals.** — For note, "Town of Emerald Isle v. State of North Carolina: A New Test for Distinguishing Between General Laws and Local Legislation," see 66 N.C.L. Rev. 1096 (1988).

## CASE NOTES

**What Is a General Law.** — A general law defines a class which reasonably warrants special legislative attention and applies uniformly to everyone in the class. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

A law is general if any rational basis reasonably related to the objective of the legislation can be identified which justifies the separation of units of local government into included and excluded categories. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

**What Is a Local Act.** — A local act unreasonably singles out a class for special legislative attention or, having made a reasonable classification, does not apply uniformly to all members of the designated class. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

**The constitutional prohibition against local acts** simply commands that when legislating in certain specified fields the General Assembly must make rational distinctions among units of local government which are reasonably related to the purpose of the legislation. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

**Distinguishing Between General and Local Acts.** — The distinguishing factors between a valid general law and a prohibited local act are the related elements of reasonable classification and uniform application. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

**The mere fact that a statute applies only to certain units of local government** does not by itself render the statute a prohibited local act. Only if the statutory classification is unreasonable or under-inclusive will the statute be voided as a prohibited local act. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

**Classification does not render a statute "local" if the classification is reasonable** and based on rational difference of situation and condition. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

**Regulation Need Not Reach Every Conceivable Class.** — There is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied, i.e., that the legislature must be held rigidly to the choice of regulating all or none. It is enough that the present statute strikes at the evil where it is felt, and reaches the class of cases where it most frequently occurs. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

**While substantial distinctions are essential in classification, the distinctions need not be scientific** or exact. The legislature has wide discretion in making classifications. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

**Coastal Area Management Act Upheld.** — The Coastal Area Management Act of 1974 (G.S. 113A-100 et seq.) is a general law which the General Assembly had power to enact. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

**Act Reviving a Town Charter.** — An Act purporting to revive a town did not violate this provision because the constitution did not direct the General Assembly to create municipalities by general laws. Bethania Town Lot Comm. v. City of Winston-Salem, 348 N.C. 664, 502 S.E.2d 360 (1998).

**Dual Office Holding in Local Law Pro-**

**hibited.** — Chapter 129 of Session Laws 1983, insofar as it provides for dual office holding in a local law, is unconstitutional. Ratcliff v. County of Buncombe, 663 F. Supp. 1003 (W.D.N.C. 1987).

**The purpose of Session Laws 1983, Chapter 539 was to establish pedestrian beach access facilities for general public use** in the vicinity of Bogue Inlet, and it was a general law, not a local act. Town of Emerald Isle ex rel. Smith v. State, 320 N.C. 640, 360 S.E.2d 756 (1987).

**Applied** in Chem-Security Sys. v. Morrow, 61 N.C. App. 147, 300 S.E.2d 393 (1983); In re City of Durham Annexation Ordinance Numbered 5991 for Area A, 69 N.C. App. 77, 316 S.E.2d 649 (1984); Floyd v. Lumberton City Bd. of Educ., 71 N.C. App. 670, 324 S.E.2d 18 (1984).

**Cited** in Town of Emerald Isle v. State, 78 N.C. App. 736, 338 S.E.2d 581 (1986); Piedmont Ford Truck Sales, Inc. v. City of Greensboro, 90 N.C. App. 692, 370 S.E.2d 262 (1988); Clark v. Craven Regional Medical Auth., 326 N.C. 15, 387 S.E.2d 168 (1990); Helton v. Good, 208 F. Supp. 2d 597, 2002 U.S. Dist. LEXIS 12436 (W.D.N.C. 2002).

## Sec. 4. Continuity of laws; protection of officeholders.

The laws of North Carolina not in conflict with this Constitution shall continue in force until lawfully altered. Except as otherwise specifically provided, the adoption of this Constitution shall not have the effect of vacating any office or term of office now filled or held by virtue of any election or appointment made under the prior Constitution of North Carolina and the laws of the State enacted pursuant thereto.

**History.** — This section is new with the Constitution of 1970.

## Sec. 5. Conservation of natural resources.

It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, to control excessive noise, and in every other appropriate way to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, openlands, and places of beauty.

To accomplish the aforementioned public purposes, the State and its counties, cities and towns, and other units of local government may acquire by purchase or gift properties or interests in properties which shall, upon their special dedication to and acceptance by a law enacted by a vote of three-fifths of the members of each house of the General Assembly for those public purposes, constitute part of the "State Nature and Historic Preserve," and which shall not be used for other purposes except as authorized by law enacted by a vote of three-fifths of the members of each house of the General Assembly. The General Assembly shall prescribe by general law the conditions and procedures under which such properties or interests therein shall be dedicated for the aforementioned public purposes. (1971, c. 630, s. 1; 1999-268, s. 3; 2001-217, s. 3; 2002-3 (Extra Session), s. 1.)

**Cross References.** — As to the Coastal Reserve Program, see G.S. 113A-129.2.

**Editor's Note.** — This section was added by the constitutional amendment adopted by vote of the people at the general election held Nov. 7, 1972.

Session Laws 1971, c. 630, s. 4, made the section effective July 1, 1973.

Session Laws 1999-268, s. 4, as amended by Session Laws 2001-217, s. 3, and as amended by Session Laws 2002-3 (Extra Session), s. 1, provides that the amendment set out in Section 3 of the act shall be submitted to the qualified voters of the State at the statewide general election in 2002, which election shall be conducted under the laws then governing elections in the State. Ballots, voting systems, or both may be used in accordance with Chapter 163 of the General Statutes. The question to be used in the voting systems and ballots shall be:

"[ ] FOR [ ] AGAINST

"Constitutional amendment making a technical correction to allow dedication and acceptance of property into the State Nature and Historic Preserve by the General Assembly by enactment of a bill rather than a joint resolution."

Session Laws 1999-268, s. 5, provides that if a majority of the votes cast on the question are in favor of the amendment set out in Section 3 of this act, the State Board of Elections shall certify the amendment to the Secretary of State. The amendment becomes effective upon this certification. The Secretary of State shall enroll the amendment so certified among the permanent records of that office.

The constitutional amendment was approved by the voters at the general election on November 5, 2002, and the results were certified by the State Board of Elections on November 19, 2002.

**Legal Periodicals.** — For article, "The Pearl in the Oyster: The Public Trust Doctrine in North Carolina," see 12 Campbell L. Rev. 23 (1989).

For a note on environmental protection provisions in state constitutions, see 46 Duke L.J. 1169 (1997).

For comment, "'Don't Know What a Slide Rule Is For': The Need for a Precise Definition of Public Purpose in North Carolina in the Wake of Kelo v. City of New London," see 28 Campbell L. Rev. 291 (2006).

For article, "The Evolution of Modern North Carolina Environmental and Conservation Policy Legislation," see 29 Campbell L. Rev. 535 (2007).

## CASE NOTES

**Cited** in State ex rel. Rohrer v. Credle, 322 N.C. 522, 369 S.E.2d 825 (1988); Smith Chapel Baptist Church v. City of Durham, 348 N.C. 632, 502 S.E.2d 364 (1998); Parker v. New Hanover County, 173 N.C. App. 644, 619 S.E.2d 868, 2005 N.C. App. LEXIS 2227 (2005).

## OPINIONS OF ATTORNEY GENERAL

**Three-Fifths Vote Not Necessary for Flowage Easement.** — Dedication of Umstead State Park to the State Nature and Historic Preserve as authorized by this section does not require a vote of three-fifths of the members of each House of the General Assembly before a flowage easement may be granted to Wake County for flood control purposes. See opinion of Attorney General to Mr. Charles L. Holliday, State Building Division, 55 N.C.A.G. 105 (1986).

# CONSTITUTION OF THE UNITED STATES

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## PREAMBLE

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.

## ARTICLE I

**§ 1.** All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

**§ 2.** [1.] The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

[2.] No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of the state in which he shall be chosen.

[3.] Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

[4.] When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

[5.] The house of representatives shall chuse their speaker and other officers; and shall have the sole power of impeachment.

**Editor's Note.** — The first sentence of Art. I, § 2, cl. 3, is amended by Amendment XIV, § 2 and Amendment XVI.

**§ 3.** [1.] The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

[2.] Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

[3.] No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

[4.] The vice president of the United States shall be president of the senate, but shall have no vote, unless they be equally divided.

[5.] The senate shall chuse their other officers, and also a president pro tempore, in the absence of the vice president, or when he shall exercise the office of president of the United States.

[6.] The senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside: And no person shall be convicted without the concurrence of two-thirds of the members present.

[7.] Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

**Editor's Note.** — Art. I, § 3, cl. 1, is superseded by Amendment XVII.

**§ 4.** [1.] The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the places of chusing senators.

[2.] The congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

**Cross References.** — As to when Congress shall assemble, see Amendment XX, § 2.

**§ 5.** [1.] Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide.

[2.] Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

[3.] Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

[4.] Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

§ **6.** [1.] The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same and for any speech or debate in either house they shall not be questioned in any other place.

[2.] No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created or the emoluments whereof shall have been increased during such time, and no person holding any office under the United States shall be a member of either house during his continuance in office.

§ **7.** [1.] All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills.

[2.] Every bill which shall have passed the house of representatives and the senate shall, before it become a law, be presented to the president of the United States. If he approve, he shall sign it; but if not, he shall return it with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sunday excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

[3.] Every order, resolution, or vote to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment) shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

§ **8.** The congress shall have power [1.] To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

[2.] To borrow money on the credit of the United States;

[3.] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

[4.] To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

[5.] To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

[6.] To provide for the punishment of counterfeiting the securities and current coin of the United States;

[7.] To establish post offices and post roads;

[8.] To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

[9.] To constitute tribunals inferior to the supreme court;

[10.] To define and punish piracies and felonies committed on the high seas, and offences against the law of nations;

[11.] To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

[12.] To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

[13.] To provide and maintain a navy;

[14.] To make rules for the government and regulation of the land and naval forces;

[15.] To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

[16.] To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by congress;

[17.] To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by session of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; — and

[18.] To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

**§ 9.** [1.] The migration or importation of such persons as any of the states now existing shall think proper to admit shall not be prohibited by the congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

[2.] The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

[3.] No bill of attainder or ex post facto law shall be passed.

[4.] No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

[5.] No tax or duty shall be laid on articles exported from any state.

[6.] No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to, or from, one state, be obliged to enter, clear or pay duties in another.

[7.] No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

[8.] No title of nobility shall be granted by the United States: And no person holding any office of profit or trust under them shall, without the consent of the congress, accept of any present, emolument, office or title, of any kind whatever, from any king, prince, or foreign state.

**§ 10.** [1.] No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts, pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

[2.] No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress.

[3.] No state shall, without the consent of congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

## ARTICLE II

§ **1.** [1.] The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice president, chosen for the same term, be elected, as follows:

[2.] Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[3.] The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately chuse by ballot one of them for president; and if no person have a majority, then from the five highest on the list the said house shall in like manner chuse the president. But in chusing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the vice president. But if there should remain two or more who have equal votes, the senate shall chuse from them by ballot the vice president.

[4.] The congress may determine the time of chusing the electors and the day on which they shall give their votes; which day shall be the same throughout the United States.

[5.] No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

[6.] In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice president, and the congress may by law provide for the case of removal, death, resignation, or inability, both of the president and vice president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.

[7.] The president shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

[8.] Before he enter on the execution of his office, he shall take the following oath or affirmation: — "I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will to the best of my ability preserve, protect and defend the constitution of the United States."

**Editor's Note.** — Art. II, § 1, cl. 3, is superseded by Amendment XII.

**§ 2.** [1.] The president shall be the commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

[2.] He shall have power, by and with the advice and consent of the senate to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law: but the congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments.

[3.] The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session.

**§ 3.** He shall from time to time give to the congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

**§ 4.** The president, vice president and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

## ARTICLE III

**§ 1.** The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

**§ 2.** [1.] The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; — to all cases affecting ambassadors, other public ministers and consuls; — to all cases of admiralty and maritime jurisdiction; — to controversies to which the United States shall be a party; — to controversies between two or more states; — between a state and citizens of another state; — between citizens of different states; — between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

[2.] In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make.

[3.] The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

**Cross References.** — As to suits against a state by citizens of another state or citizens or subjects of a foreign state, see Amendment XI.

§ **3.** [1.] Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

[2.] The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attained.

## ARTICLE IV

§ **1.** Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

§ **2.** [1.] The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

[2.] A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

[3.] No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.

§ **3.** [1.] New states may be admitted by the congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the congress.

[2.] The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

§ **4.** The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

## ARTICLE V

The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress: Provided, that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

## ARTICLE VI

[1.] All debts contracted and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution as under the confederation.

[2.] This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

[3.] The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

## ARTICLE VII

The ratification of the conventions of nine states shall be sufficient for the establishment of this constitution between the states so ratifying the same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty-seven and of the Independence of the United States of America the Twelfth. In Witness whereof we have hereunto subscribed our names.

Go. WASHINGTON

Presidt. and deputy from Virginia.

*New Hampshire.*

John Langdon and Nicholas Gilman.

*Massachusetts.*

Nathaniel Gorham and Rufus King.

*Connecticut.*

Wm. Saml. Johnson and Roger Sherman.

*New York.*

Alexander Hamilton.

*New Jersey.*

Wil: Livingston, David Brearley, Wm. Patterson and Jona: Dayton.

*Pennsylvania.*

B. Franklin, Robt. Morris, Thos. Fitzsimmons, James Wilson, Thomas Mifflin, Geo. Clymer, Jared Ingersoll and Gouv Morris.

*Delaware.*

Geo. Read, John Dickenson, Jaco: Broom, Gunning Bedford Jun, and Richard Bassett.

*Maryland.*

James McHenry, Danl. Carroll and Dan: of St. Thos. Jenifer.

*Virginia.*

John Blair—James Madison, Jr.

*North Carolina.*

Wm. Blount, Hu Williamson and Richd. Dobbs Spaight.

*South Carolina.*

Charles Pinckney, J. Rutledge, Charles Cotesworth Pinckney and Pierce Butler.

*Georgia.*

William Few and Abr. Baldwin.
Attest: William Jackson, Secretary.

The states ratified the constitution in the following order:

| | |
|---|---|
| Delaware | December 7, 1787 |
| Pennsylvania | December 12, 1787 |
| New Jersey | December 18, 1787 |
| Georgia | January 2, 1788 |
| Connecticut | January 9, 1788 |
| Massachusetts | February 6, 1788 |
| Maryland | April 26, 1788 |
| South Carolina | May 23, 1788 |
| New Hampshire | June 21, 1788 |
| Virginia | June 26, 1788 |
| New York | July 26, 1788 |
| North Carolina | November 21, 1789 |
| Rhode Island | May 29, 1790 |

# AMENDMENTS

Articles in addition to, and amendment of, the constitution of the United States of America, proposed by congress, and ratified by the legislatures of the several states, pursuant to the fifth article of the original constitution.

**Editor's Note.** — The first ten amendments were proposed by Congress on September 25, 1789, and became effective on December 15, 1791.

## Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

## Amendment II.

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

## Amendment III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law.

## Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

## Amendment V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

## Amendment VI.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

## Amendment VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law.

## Amendment VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## Amendment IX.

The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

## Amendment X.

The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people.

## Amendment XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

## Amendment XII.

The electors shall meet in their respective states, and vote by ballot for president and vice president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice president, and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate; — the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates and the votes shall then be counted; — the person having the greatest number of votes for president shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them before the fourth day of March next following, then the vice president shall act as president, as in the case of the death or other constitutional disability of the president. The person having the greatest number of votes as vice president shall be the vice president, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list the senate shall choose the vice president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president shall be eligible to that of vice president of the United States.

## Amendment XIII.

§ **1.** Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

§ **2.** Congress shall have power to enforce this article by appropriate legislation.

## Amendment XIV.

§ **1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ **2.** Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

§ **3.** No person shall be a senator or representative in congress, or elector of president and vice president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two-thirds of each house remove such disability.

§ **4.** The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

**§ 5.** The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## Amendment XV.

**§ 1.** The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

**§ 2.** The congress shall have power to enforce this article by appropriate legislation.

## Amendment XVI.

The congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

## Amendment XVII.

The senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

When vacancies happen in the representation of any state in the senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the constitution.

## Amendment XVIII.

**§ 1.** After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited.

**§ 2.** The congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

**§ 3.** This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislatures of the several states, as provided in the constitution, within seven years from the date of the submission hereof to the states by the congress.

## Amendment XIX.

**§ 1.** The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.

**§ 2.** Congress shall have power to enforce this article by appropriate legislation.

## Amendment XX.

**§ 1.** The terms of the president and vice president shall end at noon on the 20th day of January, and the terms of senators and representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

**§ 2.** The congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

**§ 3.** If, at the time fixed for the beginning of the term of the president, the president elect shall have died, the vice president elect shall become president. If a president shall not have been chosen before the time fixed for the beginning of his term, or if the president elect shall have failed to qualify, then the vice president elect shall act as president until a president shall have qualified; and the congress may by law provide for the case wherein neither a president elect nor a vice president elect shall have qualified, declaring who shall then act as president, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a president or vice president shall have qualified.

**§ 4.** The congress may by law provide for the case of the death of any of the persons from whom the house of representatives may choose a president whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the senate may choose a vice president whenever the right of choice shall have devolved upon them.

**§ 5.** Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

**§ 6.** This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

**Editor's Note.** — Amendment XX was declared in a proclamation of the Secretary of State, dated February 6, 1933, to have been ratified by 39 of the 48 states.

## Amendment XXI.

**§ 1.** The eighteenth article of amendment to the constitution of the United States is hereby repealed.

**§ 2.** The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

**§ 3.** This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by conventions in the several states, as provided in the constitution, within seven years from the date of the submission hereof to the states by the congress.

**Editor's Note.** — Amendment XXI was declared in a proclamation of the Acting Secretary of State, dated December 5, 1933, to have been ratified by 36 of the 48 states.

By his proclamation of December 5, 1933, the President proclaimed that Amendment XVIII was repealed on December 5, 1933.

## Amendment XXII.

**§ 1.** No person shall be elected to the office of the president more than twice, and no person who has held the office of president, or acted as president, for more than two years of a term to which some other person was elected president shall be elected to the office of the president more than once. But this article shall not apply to any person holding the office of president when this article was proposed by the Congress, and shall not prevent any person who may be holding the office of president, or acting as president, during the term within which this article becomes operative from holding the office of president or acting as president during the remainder of such term.

**§ 2.** This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the congress.

**Editor's Note.** — Amendment XXII was certified by the Administrator of General Services on March 1, 1951, to have been ratified by three-fourths of the whole number of states and to have become valid as a part of the Constitution of the United States.

## Amendment XXIII.

**§ 1.** The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purpose of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

**§ 2.** The Congress shall have power to enforce this article by appropriate legislation.

**Editor's Note.** — Amendment XXIII was certified by the Administrator of General Services on April 3, 1961, to have been ratified by three-fourths of the whole number of states and to have become valid as a part of the Constitution of the United States.

## Amendment XXIV.

**§ 1.** The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

**§ 2.** The Congress shall have power to enforce this article by appropriate legislation.

**Editor's Note.** — Amendment XXIV was certified by the Administrator of General Services on February 4, 1964, to have been ratified by three-fourths of the whole number of states and to have become valid as a part of the Constitution of the United States.

## Amendment XXV.

§ **1.** In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

§ **2.** Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

§ **3.** Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

§ **4.** Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

**Editor's Note.** — Amendment XXV was certified by the Administrator of General Services on February 23, 1967, to have been ratified by three-fourths of the whole number of states and to have become valid as a part of the Constitution of the United States.

## Amendment XXVI.

§ **1.** The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

§ **2.** The Congress shall have power to enforce this article by appropriate legislation.

**Editor's Note.** — Amendment XXVI was certified by the Administrator of General Services on July 5, 1971, to have been ratified by three-fourths of the whole number of states and to have become valid as a part of the Constitution of the United States.

## Amendment XXVII.

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

**Editor's Note.** — Amendment XXVII was certified by the Administrator of General Services on May 18, 1992, to have been ratified by three-fourths of the whole number of states and to have become valid as a part of the Constitution of the United States.

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# TABLES OF COMPARABLE SECTIONS: REVISAL OF 1905 AND PELL'S REVISAL TO CONSOLIDATED STATUTES

The numbers preceding the dots refer to sections in the Revisal of 1905 and lettered sections in Pell's Revisal of 1908; the numbers following the dots give the corresponding sections in the Consolidated Statutes. This table is reprinted here as it was compiled for use with the Consolidated Statutes. See also, Table of Comparable Sections: Consolidated Statutes to General Statutes, where sections transferred from the Consolidated Statutes to the General Statutes of North Carolina are shown.

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# TABLES OF DELETED SECTIONS

The sections in this table appeared in the Consolidated Statutes and in the Michie Codes. For sections transferred into sections of the General Statutes, see Table of Comparable Sections: Consolidated Statutes to General Statutes, set out in this volume.

Sections in this table preceded by an asterisk represent the following types of laws which were not codified in the General Statutes of North Carolina: (1) local in application affecting less than ten counties; (2) excepting pending litigation; (3) construction clauses; (4) repealing clauses; (5) partial invalidity clauses. The omission of such statutes does not for that reason repeal them. See General Statutes, sections 164-1 through 164-8.

Where a section was repealed by reference to its corresponding number in the General Statutes such number appears in parentheses following the repealed section.

The following abbreviations have been used in this table: Con. St. = Construction Statute; Loc. = Local; Obs. = Obsolete; P. Inv. = Partial Invalidity; P. Lit. = Pending Litigation; Rep. = Repealed; Rpl. St. = Repealing Statute; Sup. = Superseded; Unconst. = Unconstitutional.

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| 565 | 1 | 58-33A-1, 58-33A-5, 58-33A-10, 58-33A-15, 58-33A-20, 58-33A-25, 58-33A-30, 58-33A-35, 58-33A-40, 58-33A-45, 58-33A-50, 58-33A-55, 58-33A-60, 58-33A-65, 58-33A-70, 58-33A-75, 58-33A-80, 58-33A-90, 58-33A-95 |
| 566 | 1 | 58-33-10 |
| | 2 | 58-33-26 |
| | 3 | 58-33-26 |
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| | 6(a) | 58-33-35 Repealed |
| | 6(b) | 58-33-30 |
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| | 25 | 58-58-97 note |
| | 26 | 58-2-85 |
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| | 28 | 7A-292, 20-279.21 |
| 567 | 1 | 58-86-1 note |
| 568 | 1-6 | 58-50-110 note, 58-50-130 note, 58-51-80 note, 58-65-60 note, 58-67-85 note, 58-68-25 note |
| 569 | 1 | 105-458 |
| | 2 | 105-459 |
| | 3 | 105-461 |
| 570 | 1 | 7A-39.14 |
| | 2 | 7A-343.2 |
| | 3 | 14-144 |
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| | 7 | 14-404 |
| | 8(a) | 58-50-180 |
| | 8(b) | 58-65-133 |
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| | 14 | 120C-102 |
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| | 19 | 143-215.94H |
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| | 23 | 144-3 |
| | 24 | 148-84 |
| | 25 | 163-278.66 |
| | 26 | 163-278.99A |
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| | 28 | 7A-38.6 |
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| | 30(b) | 15A-268 |
| | 30(c) | 15A-268 note |
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| | 32(a) | 18C-103 |
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| | 32(d) | 18C-151 |
| | 32(e) | 114-19.16 |
| | 33 | 20-183.2 |
| | 34 | 22A-1 |
| | 34.1 | 53-244.030 |
| | 35 | 58-72-50 |
| | 36 | 62-133.5 |
| | 37 | 115C-102.6B |
| | 38 | 115C-324 |
| | 39(a) | 115C-407.15, 115C-407.16, 115C-407.17, 115C-407.18 |
| | 39(b) | 115C-407.15, 115C-407.16, 115C-407.17, 115C-407.18 |
| | 40 | 115C-525 |
| | 41 | 115D-5.1 |
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| | 43 | 122C-55 |
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| | 43.2 | 135-45.2 |
| | 44 | 136-44.50 |
| | 45 | 138A-24 |
| | 46 | 160A-200 |
| | 48 | 53-244.040 |
| | 48.2 | 7A-292 |
| 571 | 1 | 135-45 note |
| | 3(a) | 135-45.2 |
| | 3(b) | 135-45 note |
| | 3(c) | 135-44.6 |
| | 3(d) | 135-45.2 |
| | 3(e) | 135-45.6 |
| 572 | 1 | 153A-344.1 note, 160A-385.1 note |
| | 2 | 153A-344.1 note, 160A-385.1 note |
| 573 | 1 | 6-21.2 note, 45-21.16C note, 45-21.16 note, 58-70-15 note, 58-70-70 note, 58-70-115 note, 58-70-130 note, 58-70-145 note, 75-56 note, 75-65 note |
| | 2 | 45-21.16 |
| | 3 | 45-21.16C |
| | 4(a) | 58-70-15 |
| | 4(b) | 58-70-70 |
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| | 6 | 58-70-130 |
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| | 10 | 75-65 |
| 574 | 13.1 | 115C-375.4 note, 130A-152 note |
| | 13.2 | 115C-375.4 note, 130A-152 note |
| | 15.1 | 122C-1 note, 122C-102 note, 131D-4.4 note, 143B-181.5 note |
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| | 19.1 | 122C-1 note |
| | 19.2 | 122C-1 note |
| | 19.3 | 122C-1 note |
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| | 20.1 | 35A-1101 note |
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| | 20.3 | 35A-1101 note |
| | 21.1 | 90-178.1 note |
| | 21.2 | 90-178.1 note |
| | 24.1 | 115C-1 note, 115C-378 note |
| | 30.1 | 17C-1 note, 148-54 note |
| | 30.2 | 17C-1 note, 148-54 note |
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| | 46.1 | 163-278.5 note |
| | 47.1-47.4 | 147-65 note |
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| | 50.1-50.4 | 62-2 note |
| | 51.1 | 120-70.105 |
| | 52.1 | 17C-1 note, 35A-1101 note, 53-1 note, 53-164 note, 62-2 note, 90-178.1 note, 110-85 note, 115C-1 note, 115C-81 note, 115C-375.4 note, 115C-378 note, 122C-1 note, 122C-102 note, 130A-1.1 note, 130A-152 note, 131D-4.4 note, 143B-181.5 note, 143-211 note, 147-65 note, 148-54 note, 163-278.5 note |
| 575 | 3A(a)-(c) | 147-33.82 note |
| | 3C | 143B-279.3 note, 143-725 note, 147-33.76 note |
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| | 3N | 18C-164 note |
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| 575 | 19 | 143B-30.1 note |
| | 22 | 105-164.4 note |
| 576 | 1 | 161-50.5 |
| | 2 | 161-50.5 note |
| 577 | 1 | 15A-145.1 |
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# General Statutes of North Carolina

# Sections Added, Amended or Repealed 2009 Session

This table lists the sections of the General Statutes of North Carolina which were added, amended or repealed during the 2009 legislative session of the General Assembly.

In instances where the effective date of an act has been postponed beyond January 1, 2010, the effective date of such act is indicated in the right-hand column.

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|---|---|---|---|---|
| *§* | *Effect* | *Chapter* | *Section* | *Date* |
| 1-46.1 | Added | 420 | 2 | |
| 1-50 | Amended | 420 | 1 | |
| 1-52 | Amended | 171 | 5 | |
| 1-116 | Amended | 269 | 1 | |
| 1-301.2 | Amended | 362 | 5 | |
| 1-394 | Amended | 362 | 2 | |
| 1-605 | Added | 554 | 1 | |
| 1-605 | Added | 554 | 1 | |
| 1-606 | Added | 554 | 1 | |
| 1-607 | Added | 554 | 1 | |
| 1-608 | Added | 554 | 1 | |
| 1-609 | Added | 554 | 1 | |
| 1-610 | Added | 554 | 1 | |
| 1-611 | Added | 554 | 1 | |
| 1-612 | Added | 554 | 1 | |
| 1-613 | Added | 554 | 1 | |
| 1-614 | Added | 554 | 1 | |
| 1-615 | Added | 554 | 1 | |
| 1-616 | Added | 554 | 1 | |
| 1-617 | Added | 554 | 1 | |
| 1-618 | Added | 554 | 1 | |
| 1C-1601 | Amended | 417 | 1 | |
| 1C-1800 | Repealed | 325 | 1 | |
| 1C-1801 | Repealed | 325 | 1 | |
| 1C-1802 | Repealed | 325 | 1 | |
| 1C-1803 | Repealed | 325 | 1 | |
| 1C-1804 | Repealed | 325 | 1 | |
| 1C-1805 | Repealed | 325 | 1 | |
| 1C-1806 | Repealed | 325 | 1 | |
| 1C-1807 | Repealed | 325 | 1 | |
| 1C-1808 | Repealed | 325 | 1 | |
| 1C-1850 | Added | 325 | 2 | |
| 1C-1851 | Added | 325 | 2 | |
| 1C-1852 | Added | 325 | 2 | |
| 1C-1853 | Added | 325 | 2 | |
| 1C-1854 | Added | 325 | 2 | |
| 1C-1855 | Added | 325 | 2 | |
| 1C-1856 | Added | 325 | 2 | |
| 1C-1857 | Added | 325 | 2 | |
| 1C-1858 | Added | 325 | 2 | |
| 1C-1859 | Added | 325 | 2 | |
| 5A-12 | Amended | 335 | 1 | |
| 6-19.1 | Amended | 475 | 8 | |

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| *§* | *Effect* | *Chapter* | *Section* | *Date* |
| 6-21.2 | Amended | 573 | 7 |  |
| 7A-38.6 | Amended | 570 | 28 |  |
| 7A-39 | Amended | 516 | 11 |  |
| 7A-39.14 | Amended | 570 | 1 |  |
| 7A-44 | Amended | 451 | 15.10 |  |
| 7A-44 | Amended | 575 | 13 |  |
| 7A-60 | Amended | 451 | 15.17E | 1/15/11 |
| 7A-65 | Amended | 451 | 15.17B |  |
| 7A-108 | Amended | 516 | 4 |  |
| 7A-133 | Amended | 341 | 1 |  |
| 7A-144 | Amended | 451 | 15.17B |  |
| 7A-146 | Amended | 419 | 2 |  |
| 7A-199 | Amended | 398 | 1 |  |
| 7A-214 | Amended | 359 | 1 |  |
| 7A-271 | Amended | 452 | 1 |  |
| 7A-271 | Amended | 516 | 7 |  |
| 7A-272 | Amended | 452 | 2 |  |
| 7A-272 | Amended | 516 | 8 |  |
| 7A-292 | Amended | 419 | 1 |  |
| 7A-292 | Amended | 440 | 2 |  |
| 7A-292 | Amended | 566 | 28 |  |
| 7A-292 | Amended | 570 | 48.2 |  |
| 7A-293 | Amended | 398 | 2 |  |
| 7A-304 | Amended | 451 | 15.20 | 7/1/10 |
| 7A-304 | Amended | 516 | 1 |  |
| 7A-304 | Amended | 575 | 13A |  |
| 7A-305 | Amended | 451 | 15.20 | 7/1/10 |
| 7A-306 | Amended | 451 | 15.20 | 7/1/10 |
| 7A-307 | Amended | 444 | 3 |  |
| 7A-307 | Amended | 451 | 15.20 | 7/1/10 |
| 7A-307 | Amended | 570 | 29 |  |
| 7A-308 | Amended | 317 | 1 |  |
| 7A-308 | Amended | 451 | 15.20 |  |
| 7A-321 | Amended | 451 | 15.20 |  |
| 7A-321 | Amended | 575 | 14 |  |
| 7A-343 | Amended | 516 | 3 |  |
| 7A-343.2 | Amended | 570 | 2 |  |
| 7A-343.4 | Added | 516 | 5 |  |
| 7A-343.5 | Added | 516 | 6 |  |
| 7A-451 | Amended | 91 | 1 |  |
| 7A-451 | Amended | 387 | 3 |  |
| 7A-451 | Amended | 387 | 5 |  |
| 7A-455.1 | Amended | 451 | 15.17I |  |
| 7A-498.7 | Amended | 451 | 15.17B |  |
| 7A-791 | Amended | 451 | 15.11 |  |
| 7A-809 | Added | 355 | 4 |  |
| 7B-101 | Amended | 38 | 1 |  |
| 7B-302 | Amended | 311 | 1 |  |
| 7B-400 | Amended | 311 | 2 |  |
| 7B-402 | Amended | 311 | 3 |  |
| 7B-700 | Amended | 311 | 4 |  |
| 7B-900.1 | Added | 311 | 5 |  |
| 7B-906 | Amended | 311 | 6 |  |
| 7B-907 | Amended | 311 | 7 |  |
| 7B-908 | Amended | 311 | 8 |  |
| 7B-1101.1 | Amended | 311 | 9 |  |
| 7B-1104 | Amended | 38 | 2 |  |
| 7B-1106 | Amended | 38 | 3 |  |
| 7B-1106 | Amended | 311 | 10 |  |

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| 7B-1106.1 | Amended | 38 | 4 | |
| 7B-1106.1 | Amended | 311 | 11 | |
| 7B-1108 | Amended | 311 | 12 | |
| 7B-1108.1 | Added | 311 | 13 | |
| 7B-1301 | Amended | 451 | 10.43 | |
| 7B-1302 | Amended | 451 | 10.43 | |
| 7B-1501 | Amended | 545 | 1 | |
| 7B-1501 | Amended | 547 | 1 | |
| 7B-1700.1 | Added | 311 | 14 | |
| 7B-1904 | Amended | 311 | 15 | |
| 7B-2411 | Amended | 545 | 4 | |
| 7B-2503 | Amended | 311 | 16 | |
| 7B-2506 | Amended | 311 | 17 | |
| 7B-2901 | Amended | 311 | 18 | |
| 7B-3000 | Amended | 372 | 1 | |
| 7B-3000 | Amended | 545 | 2 | |
| 7B-3001 | Amended | 372 | 2 | |
| 7B-3001 | Amended | 545 | 3 | |
| 7B-3100 | Amended | 372 | 3 | |
| 8-58.20 | Amended | 473 | 1 | |
| 8-58.20 | Amended | 473 | 2 | |
| 8C-1-616 | Added | 514 | 1 | |
| 9-4 | Amended | 518 | 1 | |
| 10B-5 | Amended | 227 | 1 | |
| 10B-71 | Added | 358 | 1 | |
| 14-50.27A | Added | 93 | 1 | |
| 14-50.29 | Amended | 510 | 2 | 10/1/10 |
| 14-50.29 | Amended | 577 | 4 | |
| 14-50.30 | Amended | 510 | 3 | 10/1/10 |
| 14-50.30 | Amended | 577 | 5 | |
| 14-72.1 | Amended | 372 | 12 | |
| 14-72.8 | Added | 379 | 1 | |
| 14-86.2 | Added | 37 | 1 | |
| 14-90 | Amended | 348 | 1 | |
| 14-90 | Amended | 570 | 31 | |
| 14-135 | Amended | 508 | 1 | |
| 14-144 | Amended | 570 | 3 | |
| 14-160.1 | Amended | 204 | 1 | |
| 14-160.2 | Added | 204 | 2 | |
| 14-163.1 | Amended | 460 | 1 | |
| 14-202.3 | Amended | 336 | 1 | |
| 14-202.5A | Amended | 272 | 1 | |
| 14-202.5 | Amended | 570 | 4 | |
| 14-208.6 | Amended | 498 | 1 | |
| 14-208.15A | Amended | 272 | 2 | |
| 14-208.18 | Amended | 570 | 5 | |
| 14-208.19A | Added | 491 | 1 | |
| 14-208.40B | Amended | 387 | 4 | |
| 14-226.3 | Added | 415 | 1 | |
| 14-230 | Amended | 107 | 1 | |
| 14-234 | Amended | 2 | 2 | |
| 14-234 | Amended | 226 | 1 | |
| 14-258.1 | Amended | 560 | 3 | 3/1/10 |
| 14-269 | Amended | 281 | 1 | |
| 14-269.4 | Amended | 513 | 1 | |
| 14-277.4A | Added | 300 | 1 | |
| 14-288.1 | Amended | 281 | 1 | |
| 14-288.12 | Amended | 146 | 1 | |
| 14-288.19 | Amended | 281 | 1 | |

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| 14-309.7 | Amended | 451 | 17.6 | |
| 14-309.15 | Amended | 49 | 1 | |
| 14-318.2 | Amended | 570 | 6 | |
| 14-344 | Amended | 255 | 1 | |
| 14-344.1 | Amended | 255 | 1 | |
| 14-344.2 | Amended | 255 | 1 | |
| 14-401.23 | Added | 538 | 1 | |
| 14-402 | Amended | 6 | 2 | |
| 14-404 | Amended | 570 | 7 | |
| 14-406 | Amended | 6 | 3 | |
| 14-406.1 | Added | 6 | 1 | |
| 14-410 | Amended | 507 | 1 | 2/1/10 |
| 14-413 | Amended | 507 | 2 | 2/1/10 |
| 14-415.10 | Amended | 307 | 2 | |
| 14-415.12 | Amended | 58 | 1 | |
| 14-415.16 | Amended | 307 | 1 | |
| 14-415.26 | Amended | 546 | 1 | |
| 14-416 | Amended | 344 | 1 | |
| 14-417 | Amended | 344 | 1 | |
| 14-417.1 | Added | 344 | 1 | |
| 14-417.2 | Added | 344 | 1 | |
| 14-418 | Amended | 344 | 1 | |
| 14-419 | Amended | 344 | 1 | |
| 14-420 | Amended | 344 | 1 | |
| 14-421 | Amended | 344 | 1 | |
| 14-422 | Amended | 344 | 1 | |
| 14-453 | Amended | 551 | 2 | |
| 14-458.1 | Added | 551 | 1 | |
| 15-209 | Amended | 451 | 19.19 | |
| 15A-131 | Amended | 398 | 3 | |
| 15A-145 | Amended | 510 | 4 | 10/1/10 |
| 15A-145 | Amended | 577 | 10 | |
| 15A-145.1 | Added | 577 | 1 | |
| 15A-145.2 | Added | 577 | 2 | |
| 15A-145.3 | Added | 577 | 3 | |
| 15A-146 | Amended | 510 | 5 | 10/1/10 |
| 15A-146 | Amended | 577 | 3.1 | |
| 15A-146 | Amended | 577 | 8 | |
| 15A-146 | Amended | 577 | 9 | |
| 15A-147 | Amended | 510 | 6 | 10/1/10 |
| 15A-149 | Amended | 510 | 7 | 10/1/10 |
| 15A-150 | Added | 510 | 1 | 10/1/10 |
| 15A-151 | Added | 510 | 1 | 10/1/10 |
| 15A-152 | Added | 510 | 1 | 10/1/10 |
| 15A-266.1 | Amended | 203 | 1 | |
| 15A-266.2 | Amended | 203 | 2 | |
| 15A-266.4 | Amended | 58 | 2 | |
| 15A-267 | Amended | 203 | 3 | |
| 15A-268 | Amended | 203 | 4 | |
| 15A-268 | Amended | 570 | 30 | |
| 15A-269 | Amended | 203 | 5 | |
| 15A-270.1 | Amended | 203 | 6 | |
| 15A-401 | Amended | 544 | 2 | |
| 15A-531 | Amended | 547 | 2 | |
| 15A-534 | Amended | 412 | 1 | |
| 15A-534 | Amended | 547 | 3 | |
| 15A-534 | Amended | 547 | 4 | |
| 15A-534 | Amended | 547 | 4.1 | |
| 15A-534.3 | Amended | 501 | 1 | |

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| | | *Chapter* | *Section* | |
| 15A-535 | Amended | 547 | 5 | |
| 15A-544.4 | Amended | 550 | 1 | |
| 15A-544.5 | Amended | 437 | 1 | |
| 15A-544.5 | Amended | 437 | 1.1 | |
| 15A-544.5 | Amended | 437 | 2 | |
| 15A-830 | Amended | 58 | 3 | |
| 15A-1023 | Amended | 179 | 1 | |
| 15A-1026 | Amended | 179 | 2 | |
| 15A-1225.1 | Added | 356 | 1 | |
| 15A-1225.2 | Added | 514 | 2 | |
| 15A-1340.11 | Amended | 372 | 5 | |
| 15A-1340.11 | Amended | 547 | 6 | |
| 15A-1340.14 | Amended | 555 | 1 | |
| 15A-1340.16 | Amended | 460 | 2 | |
| 15A-1340.17 | Amended | 555 | 2 | |
| 15A-1340.17 | Amended | 556 | 1 | |
| 15A-1340.50 | Added | 380 | 1 | |
| 15A-1341 | Amended | 372 | 4 | |
| 15A-1342 | Amended | 372 | 10 | |
| 15A-1343 | Amended | 275 | 1 | |
| 15A-1343 | Amended | 372 | 9 | |
| 15A-1343 | Amended | 547 | 7 | |
| 15A-1344 | Amended | 372 | 11 | |
| 15A-1344 | Amended | 411 | 1 | |
| 15A-1344 | Amended | 452 | 3 | |
| 15A-1344 | Amended | 452 | 4 | |
| 15A-1344 | Amended | 516 | 9 | |
| 15A-1344 | Amended | 516 | 10 | |
| 15A-1345 | Amended | 412 | 2 | |
| 15A-1371 | Amended | 372 | 13 | |
| 15A-1371 | Amended | 451 | 19.26 | |
| 15A-1371 | Amended | 575 | 16A | |
| 15A-1415 | Amended | 517 | 2 | |
| 15A-1420 | Amended | 517 | 1 | |
| 15A-1468 | Amended | 360 | 1 | |
| 15A-2010 | Added | 464 | 1 | |
| 15A-2011 | Added | 464 | 1 | |
| 15A-2012 | Added | 464 | 1 | |
| 15B-2 | Amended | 355 | 5 | |
| 15B-10 | Amended | 354 | 3 | |
| 15B-11 | Amended | 354 | 4 | |
| 15B-26 | Added | 355 | 6 | |
| 15C-2 | Amended | 58 | 4 | |
| 17C-6 | Amended | 546 | 2 | |
| 17C-11 | Amended | 546 | 3 | |
| 18B-103 | Amended | 539 | 1 | |
| 18B-801 | Amended | 36 | 1 | |
| 18B-902 | Amended | 105 | 1 | |
| 18B-902 | Amended | 377 | 1 | |
| 18B-903 | Amended | 105 | 2 | |
| 18B-1000 | Amended | 539 | 4 | |
| 18B-1001 | Amended | 377 | 2 | |
| 18B-1001 | Amended | 539 | 3 | |
| 18B-1008 | Amended | 381 | 1 | |
| 18B-1100 | Amended | 377 | 3 | |
| 18B-1114.4 | Amended | 539 | 2 | |
| 18B-1114.5 | Added | 377 | 4 | |
| 18C-103 | Amended | 357 | 5 | |
| 18C-103 | Amended | 570 | 32 | |

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| 18C-113 | Amended | 357 | 6 | |
| 18C-114 | Amended | 357 | 1 | |
| 18C-114 | Amended | 570 | 32 | |
| 18C-120 | Amended | 357 | 7 | |
| 18C-122 | Amended | 357 | 15 | |
| 18C-132 | Amended | 357 | 8 | |
| 18C-132 | Amended | 357 | 14 | |
| 18C-134 | Amended | 357 | 9 | |
| 18C-134 | Amended | 357 | 10 | |
| 18C-142 | Amended | 357 | 11 | |
| 18C-143 | Amended | 357 | 13 | |
| 18C-150 | Amended | 357 | 2 | |
| 18C-151 | Amended | 357 | 3 | |
| 18C-151 | Amended | 570 | 32 | |
| 18C-152 | Amended | 357 | 4 | |
| 18C-162 | Amended | 357 | 12 | |
| 20-4.01 | Amended | 274 | 1 | |
| 20-4.01 | Amended | 405 | 1 | |
| 20-4.01 | Amended | 405 | 4 | |
| 20-4.01 | Amended | 416 | 1 | 3/31/10 |
| 20-4.01 | Amended | 416 | 2 | 3/31/10 |
| 20-7 | Amended | 274 | 2 | |
| 20-7 | Amended | 274 | 3 | |
| 20-7 | Amended | 281 | 1 | |
| 20-7 | Amended | 451 | 9.5 | |
| 20-7 | Amended | 492 | 1 | 1/1/11 |
| 20-7 | Amended | 492 | 2 | 1/1/11 |
| 20-8 | Amended | 274 | 4 | |
| 20-17.4 | Amended | 416 | 3 | 3/31/10 |
| 20-17.4 | Amended | 491 | 2 | |
| 20-17.8 | Amended | 369 | 5 | |
| 20-17.8 | Amended | 369 | 6 | |
| 20-17.9 | Added | 491 | 3 | |
| 20-19 | Amended | 369 | 1 | |
| 20-19 | Amended | 369 | 2 | |
| 20-19 | Amended | 369 | 3 | |
| 20-19 | Amended | 369 | 4 | |
| 20-19 | Amended | 500 | 1 | |
| 20-19 | Amended | 500 | 2 | |
| 20-27.1 | Added | 491 | 4 | |
| 20-36 | Amended | 416 | 4 | 3/31/10 |
| 20-37.5 | Amended | 493 | 1 | |
| 20-37.6 | Amended | 493 | 2 | |
| 20-37.7 | Amended | 493 | 3 | |
| 20-37.12 | Amended | 416 | 5 | 3/31/10 |
| 20-37.13 | Amended | 491 | 5 | |
| 20-37.13 | Amended | 494 | 1 | |
| 20-37.14A | Added | 491 | 6 | |
| 20-37.19 | Amended | 416 | 6 | 3/31/10 |
| 20-37.21 | Amended | 416 | 7 | 3/31/10 |
| 20-49.3 | Added | 495 | 1 | |
| 20-52 | Amended | 274 | 4 | |
| 20-53 | Amended | 405 | 5 | |
| 20-53.1 | Added | 405 | 2 | |
| 20-53.3 | Added | 405 | 6 | |
| 20-54 | Amended | 319 | 1 | |
| 20-63 | Amended | 445 | 24 | |
| 20-63 | Amended | 456 | 1 | |
| 20-70 | Amended | 405 | 3 | |

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|---|---|---|---|---|
| 20-71.4 | Amended | 550 | 2 | |
| 20-73 | Amended | 81 | 1 | |
| 20-73 | Amended | 550 | 2 | |
| 20-79.1A | Amended | 445 | 24 | 7/1/11 |
| 20-79.1A | Amended | 445 | 25 | |
| 20-79.1 | Amended | 445 | 25 | |
| 20-79.4 | Amended | 121 | 1 | |
| 20-79.4 | Amended | 274 | 4 | |
| 20-79.4 | Amended | 376 | 1 | |
| 20-79.7 | Amended | 228 | 1 | |
| 20-97 | Amended | 166 | 2 | |
| 20-101 | Amended | 376 | 3 | |
| 20-116 | Amended | 7 | 1 | |
| 20-116 | Amended | 127 | 1 | |
| 20-116 | Amended | 128 | 1 | |
| 20-117 | Amended | 376 | 4 | |
| 20-118 | Amended | 127 | 2 | |
| 20-118 | Amended | 376 | 6 | |
| 20-118 | Amended | 376 | 16 | |
| 20-118 | Amended | 531 | 1 | |
| 20-119 | Amended | 376 | 7 | |
| 20-119 | Amended | 376 | 8 | |
| 20-122.1 | Amended | 376 | 5 | |
| 20-124 | Amended | 376 | 10 | |
| 20-124 | Amended | 376 | 11 | |
| 20-130.1 | Amended | 526 | 1 | |
| 20-130.1 | Amended | 550 | 3 | |
| 20-135.2A | Amended | 376 | 12 | |
| 20-136.1 | Amended | 376 | 13 | |
| 20-137.3 | Amended | 135 | 1 | |
| 20-137.4A | Added | 135 | 2 | |
| 20-139.1 | Amended | 473 | 3 | |
| 20-139.1 | Amended | 473 | 4 | |
| 20-139.1 | Amended | 473 | 5 | |
| 20-139.1 | Amended | 473 | 6 | |
| 20-140.4 | Amended | 451 | 15.20 | |
| 20-141 | Amended | 234 | 1 | |
| 20-141 | Amended | 234 | 2 | |
| 20-141.4 | Amended | 528 | 1 | |
| 20-161 | Amended | 104 | 1 | |
| 20-178.1 | Added | 376 | 2 | |
| 20-179 | Amended | 372 | 14 | |
| 20-179.3 | Amended | 372 | 15 | |
| 20-179.4 | Amended | 451 | 19.26 | |
| 20-179.4 | Amended | 575 | 16A | |
| 20-179.4 | Repealed | 372 | 16 | |
| 20-183.2 | Amended | 570 | 33 | |
| 20-183.4C | Amended | 319 | 2 | |
| 20-183.7 | Amended | 319 | 3 | |
| 20-183.8A | Amended | 319 | 4 | |
| 20-183.8G | Amended | 550 | 3.1 | |
| 20-183.8 | Amended | 319 | 5 | |
| 20-188 | Amended | 461 | 3 | |
| 20-217 | Amended | 147 | 1 | |
| 20-217 | Amended | 147 | 2 | |
| 20-218 | Amended | 550 | 3.2 | |
| 20-279.21 | Amended | 440 | 1 | |
| 20-279.21 | Amended | 561 | 1 | |
| 20-279.21 | Amended | 566 | 28 | |

# TABLE OF SECTIONS ADDED, AMENDED OR REPEALED

| *G.S.* *§* | *Effect* | *Session Laws* *Chapter* | *Section* | *Postponed Effective Date* |
|---|---|---|---|---|
| 20-305 | Amended | 338 | 1 | |
| 20-305 | Amended | 338 | 2 | |
| 20-305 | Amended | 338 | 5 | |
| 20-305 | Amended | 496 | 1 | |
| 20-305.1 | Amended | 338 | 3 | |
| 20-305.1 | Amended | 338 | 4 | |
| 20-305.1 | Amended | 550 | 2 | |
| 20-305.2 | Amended | 496 | 2 | |
| 20-309 | Amended | 550 | 4 | |
| 20-347 | Amended | 550 | 2 | |
| 20-381 | Amended | 376 | 9 | |
| 20-382.2 | Amended | 376 | 2 | |
| 20-382.2 | Amended | 376 | 14 | |
| 22A-1 | Amended | 570 | 34 | |
| 22B-20 | Amended | 553 | 3 | |
| 24-1.1E | Amended | 457 | 1 | |
| 24-1.1F | Amended | 457 | 2 | |
| 24-11 | Amended | 570 | 27 | |
| 28A-13-3 | Amended | 48 | 10 | |
| 28A-19-6 | Amended | 288 | 1 | |
| 28A-19-9 | Amended | 288 | 2 | |
| 28A-21-2.2 | Added | 444 | 2 | |
| 28A-22-11 | Added | 312 | 3 | |
| 28A-25-1 | Amended | 175 | 1 | |
| 28A-25-1.1 | Amended | 175 | 2 | |
| 28A-29-1 | Added | 444 | 1 | |
| 28A-29-2 | Added | 444 | 1 | |
| 28A-29-4 | Added | 444 | 1 | |
| 28A-29-5 | Added | 444 | 1 | |
| 30-3.1 | Amended | 368 | 1 | |
| 30-3.2 | Amended | 368 | 1 | |
| 30-3.3A | Added | 368 | 1 | |
| 30-3.3 | Repealed | 368 | 1 | |
| 30-3.4 | Amended | 368 | 1 | |
| 30-3.5 | Amended | 368 | 1 | |
| 30-3.6 | Amended | 368 | 1 | |
| 30-15 | Amended | 183 | 1 | |
| 30-26 | Amended | 183 | 2 | |
| 30-29 | Amended | 183 | 3 | |
| 31B-1 | Amended | 48 | 1 | |
| 31B-1.1 | Amended | 48 | 2 | |
| 31B-1.2 | Added | 48 | 3 | |
| 31B-2 | Amended | 48 | 4 | |
| 31B-2.1 | Added | 48 | 5 | |
| 31B-3 | Amended | 48 | 6 | |
| 31B-4 | Amended | 48 | 7 | |
| 31B-4.1 | Added | 48 | 8 | |
| 31B-6 | Repealed | 48 | 9 | |
| 31-4.1 | Added | 182 | 1 | |
| 31-4.2 | Added | 182 | 2 | |
| 31-36 | Amended | 131 | 1 | |
| 32A-1 | Amended | 48 | 11 | |
| 32A-2 | Amended | 48 | 12 | |
| 32A-14.1 | Amended | 48 | 13 | |
| 32A-14.2 | Added | 48 | 14 | |
| 35A-1116 | Amended | 387 | 1 | |
| 35A-1217 | Added | 387 | 2 | |
| 35A-1232 | Amended | 309 | 1 | |
| 36B-1 | Repealed | 8 | 1 | |

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| § | Effect | Chapter | Section | Date |
| 36B-2 | Repealed | 8 | 1 | |
| 36B-3 | Repealed | 8 | 1 | |
| 36B-4 | Repealed | 8 | 1 | |
| 36B-5 | Repealed | 8 | 1 | |
| 36B-6 | Repealed | 8 | 1 | |
| 36B-7 | Repealed | 8 | 1 | |
| 36B-8 | Repealed | 8 | 1 | |
| 36B-9 | Repealed | 8 | 1 | |
| 36B-10 | Repealed | 8 | 1 | |
| 36C-1-103 | Amended | 222 | 1 | |
| 36C-1-105 | Amended | 48 | 15 | |
| 36C-2-203 | Amended | 267 | 1 | |
| 36C-2-203 | Amended | 318 | 2 | |
| 36C-3-302 | Amended | 222 | 2 | |
| 36C-4-401 | Amended | 267 | 2 | |
| 36C-4-401.2 | Added | 267 | 3 | |
| 36C-4-405.2 | Added | 8 | 3 | |
| 36C-4-413 | Amended | 8 | 4 | |
| 36C-8-816 | Amended | 48 | 16 | |
| 36C-8-816 | Amended | 48 | 17 | |
| 36C-8-816 | Amended | 222 | 3 | |
| 36C-8-816.1 | Added | 318 | 1 | |
| 36E | Added | 8 | 2 | |
| 36E-1 | Added | 8 | 2 | |
| 36E-2 | Added | 8 | 2 | |
| 36E-3 | Added | 8 | 2 | |
| 36E-4 | Added | 8 | 2 | |
| 36E-5 | Added | 8 | 2 | |
| 36E-6 | Added | 8 | 2 | |
| 36E-7 | Added | 8 | 2 | |
| 36E-8 | Added | 8 | 2 | |
| 36E-9 | Added | 8 | 2 | |
| 36E-10 | Added | 8 | 2 | |
| 36E-11 | Added | 8 | 2 | |
| 39-44 | Amended | 174 | 1 | |
| 39-46 | Amended | 174 | 2 | |
| 40A-42 | Amended | 85 | 1 | |
| 40A-80 | Added | 439 | 1 | |
| 40A-81 | Added | 439 | 1 | |
| 40A-82 | Added | 439 | 1 | |
| 40A-83 | Added | 439 | 1 | |
| 40A-84 | Added | 439 | 1 | |
| 40A-85 | Added | 439 | 1 | |
| 41A-4 | Amended | 388 | 1 | |
| 41A-4 | Amended | 533 | 1 | |
| 41A-5 | Amended | 388 | 2 | |
| 41-2 | Amended | 268 | 1 | |
| 42A-36 | Amended | 245 | 2 | |
| 42-29 | Amended | 246 | 1 | |
| 42-34 | Amended | 279 | 2 | |
| 42-42 | Amended | 279 | 3 | |
| 42-46 | Amended | 279 | 4 | |
| 42-52 | Amended | 279 | 5 | |
| 42-55 | Amended | 279 | 6 | |
| 44A-40 | Amended | 201 | 1 | |
| 44A-41 | Amended | 201 | 1 | |
| 44A-43 | Amended | 201 | 1 | |
| 44A-44 | Amended | 201 | 1 | |
| 44A-44.1 | Added | 201 | 1 | |

| *G.S.* § | *Effect* | *Session Laws* |  | *Postponed Effective Date* |
|---|---|---|---|---|
|  |  | *Chapter* | *Section* |  |
| 45A-8 | Added | 348 | 2 |  |
| 45-10 | Amended | 176 | 1 |  |
| 45-21.16C | Added | 573 | 3 |  |
| 45-21.16 | Amended | 573 | 2 |  |
| 45-21.38A | Added | 441 | 1 |  |
| 45-21.38C | Added | 441 | 2 |  |
| 45-67 | Amended | 197 | 1 |  |
| 45-68 | Amended | 197 | 2 |  |
| 45-69 | Amended | 197 | 3 |  |
| 45-70 | Amended | 197 | 4 |  |
| 45-101 | Amended | 457 | 3 |  |
| 46-2.1 | Added | 362 | 3 |  |
| 46-6 | Amended | 512 | 1 |  |
| 46-17 | Amended | 362 | 1 |  |
| 46-22 | Amended | 512 | 2 |  |
| 46-22.1 | Added | 512 | 3 |  |
| 46-28 | Amended | 512 | 4 |  |
| 46-28.1 | Amended | 362 | 4 |  |
| 46-28.1 | Amended | 512 | 5 |  |
| 47C-3-116 | Amended | 515 | 2 |  |
| 47F-3-116 | Amended | 515 | 1 |  |
| 48-1-109 | Amended | 185 | 1 |  |
| 48-2-205 | Amended | 185 | 2.2 |  |
| 48-2-301 | Amended | 185 | 2.1 |  |
| 48-2-401 | Amended | 185 | 3 |  |
| 48-2-501 | Amended | 185 | 4 |  |
| 48-3-608 | Amended | 185 | 5 |  |
| 48-3-706 | Amended | 185 | 6 |  |
| 50B-1 | Amended | 58 | 5 |  |
| 50B-2 | Amended | 342 | 2 |  |
| 50B-3 | Amended | 425 | 1 |  |
| 50B-4 | Amended | 342 | 4 |  |
| 50B-4.1 | Amended | 342 | 5 |  |
| 50B-4.1 | Amended | 389 | 2 |  |
| 50C-1 | Amended | 58 | 6 |  |
| 50C-3 | Amended | 342 | 3 |  |
| 50-13.2 | Amended | 314 | 1 |  |
| 50-22 | Amended | 224 | 1 |  |
| 51-1 | Amended | 13 | 1 |  |
| 52-13 | Added | 400 | 1 |  |
| 53-87.1 | Added | 28 | 1 |  |
| 53-92 | Amended | 57 | 1 |  |
| 53-122 | Amended | 451 | 14.20 |  |
| 53-188 | Amended | 57 | 2 |  |
| 53-208.27 | Amended | 57 | 3 |  |
| 53-215 | Amended | 57 | 4 |  |
| 53-224.30 | Amended | 57 | 5 |  |
| 53-231 | Amended | 57 | 6 |  |
| 53-232.17 | Amended | 57 | 7 |  |
| 53-243.01 | Repealed | 374 | 1 |  |
| 53-243.02 | Repealed | 374 | 1 |  |
| 53-243.03 | Repealed | 374 | 1 |  |
| 53-243.04 | Repealed | 374 | 1 |  |
| 53-243.05A | Repealed | 374 | 1 |  |
| 53-243.05 | Repealed | 374 | 1 |  |
| 53-243.06 | Repealed | 374 | 1 |  |
| 53-243.07 | Repealed | 374 | 1 |  |
| 53-243.08 | Repealed | 374 | 1 |  |
| 53-243.09 | Repealed | 374 | 1 |  |

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| § | Effect | Chapter | Section | Date |
| 53-243.10 | Repealed | 374 | 1 | |
| 53-243.11 | Repealed | 374 | 1 | |
| 53-243.12 | Repealed | 374 | 1 | |
| 53-243.13 | Repealed | 374 | 1 | |
| 53-243.14 | Repealed | 374 | 1 | |
| 53-243.15 | Repealed | 374 | 1 | |
| 53-243.16 | Repealed | 374 | 1 | |
| 53-243.17 | Repealed | 374 | 1 | |
| 53-243.18 | Repealed | 374 | 1 | |
| 53-244.010 | Added | 374 | 2 | |
| 53-244.020 | Added | 374 | 2 | |
| 53-244.030 | Amended | 570 | 34.1 | |
| 53-244.030 | Added | 374 | 2 | |
| 53-244.040 | Amended | 570 | 48 | |
| 53-244.040 | Added | 374 | 2 | |
| 53-244.050 | Added | 374 | 2 | |
| 53-244.060 | Added | 374 | 2 | |
| 53-244.070 | Added | 374 | 2 | |
| 53-244.080 | Added | 374 | 2 | |
| 53-244.090 | Added | 374 | 2 | |
| 53-244.100 | Added | 374 | 2 | |
| 53-244.101 | Added | 374 | 2 | |
| 53-244.102 | Added | 374 | 2 | |
| 53-244.103 | Added | 374 | 2 | |
| 53-244.104 | Added | 374 | 2 | |
| 53-244.105 | Added | 374 | 2 | |
| 53-244.106 | Added | 374 | 2 | |
| 53-244.107 | Added | 374 | 2 | |
| 53-244.108 | Added | 374 | 2 | |
| 53-244.109 | Added | 374 | 2 | |
| 53-244.110 | Added | 374 | 2 | |
| 53-244.111 | Added | 374 | 2 | |
| 53-244.112 | Added | 374 | 2 | |
| 53-244.113 | Added | 374 | 2 | |
| 53-244.114 | Added | 374 | 2 | |
| 53-244.115 | Added | 374 | 2 | |
| 53-244.116 | Added | 374 | 2 | |
| 53-244.117 | Added | 374 | 2 | |
| 53-244.118 | Added | 374 | 2 | |
| 53-244.119 | Added | 374 | 2 | |
| 53-244.120 | Added | 374 | 2 | |
| 53-244.121 | Added | 374 | 2 | |
| 53-252 | Amended | 57 | 8 | |
| 53-272 | Amended | 57 | 9 | |
| 53-289 | Amended | 57 | 10 | |
| 53-412 | Amended | 57 | 11 | |
| 57C-1-20 | Amended | 247 | 1 | |
| 57C-3-01 | Amended | 247 | 2 | |
| 57C-4-06 | Amended | 247 | 3 | |
| 57C-5-04 | Amended | 247 | 4 | |
| 57C-5-05 | Amended | 247 | 5 | |
| 57C-6-01 | Amended | 247 | 6 | |
| 57C-6-06.1 | Repealed | 247 | 7 | |
| 57C-10-03 | Amended | 247 | 8 | |
| 58-2-69 | Amended | 566 | 20 | |
| 58-2-85 | Amended | 566 | 26 | |
| 58-2-90 | Amended | 566 | 27 | |
| 58-2-250 | Added | 383 | 2 | |
| 58-3-215 | Amended | 382 | 18 | |

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| 58-3-220 | Amended | 382 | 19 | |
| 58-3-225 | Amended | 382 | 16 | |
| 58-3-230 | Amended | 487 | 1 | |
| 58-3-276 | Added | 286 | 2 | |
| 58-3-280 | Added | 313 | 1 | |
| 58-6-5 | Amended | 451 | 21.11 | |
| 58-6-7 | Amended | 451 | 21.11 | |
| 58-6-25 | Amended | 445 | 44 | |
| 58-7-21 | Amended | 451 | 21.15 | |
| 58-9-22 | Added | 172 | 1 | |
| 58-10-125 | Amended | 254 | 1 | |
| 58-10-185 | Added | 384 | 1 | |
| 58-10-185 | Added | 384 | 1 | |
| 58-10-190 | Added | 384 | 1 | |
| 58-10-195 | Added | 384 | 1 | |
| 58-10-200 | Added | 384 | 1 | |
| 58-10-205 | Added | 384 | 1 | |
| 58-10-210 | Added | 384 | 1 | |
| 58-10-215 | Added | 384 | 1 | |
| 58-10-220 | Added | 384 | 1 | |
| 58-10-225 | Added | 384 | 1 | |
| 58-10-230 | Added | 384 | 1 | |
| 58-10-235 | Added | 384 | 1 | |
| 58-10-240 | Added | 384 | 1 | |
| 58-10-245 | Added | 384 | 1 | |
| 58-10-250 | Added | 384 | 1 | |
| 58-10-255 | Added | 384 | 1 | |
| 58-10-260 | Added | 384 | 1 | |
| 58-10-265 | Added | 384 | 1 | |
| 58-16-5 | Amended | 172 | 8 | |
| 58-21-20 | Amended | 451 | 21.14 | |
| 58-21-65 | Amended | 566 | 11 | |
| 58-22-70 | Amended | 451 | 21.12 | |
| 58-23-26 | Amended | 384 | 2 | |
| 58-30-85 | Amended | 172 | 2 | |
| 58-30-130 | Amended | 570 | 27 | |
| 58-30-165 | Amended | 172 | 3 | |
| 58-31-40 | Amended | 474 | 1 | |
| 58-33A-1 | Added | 565 | 1 | 7/1/10 |
| 58-33A-5 | Added | 565 | 1 | 7/1/10 |
| 58-33A-10 | Added | 565 | 1 | 7/1/10 |
| 58-33A-15 | Added | 565 | 1 | 7/1/10 |
| 58-33A-20 | Added | 565 | 1 | 7/1/10 |
| 58-33A-25 | Added | 565 | 1 | 7/1/10 |
| 58-33A-30 | Added | 565 | 1 | 7/1/10 |
| 58-33A-35 | Added | 565 | 1 | 7/1/10 |
| 58-33A-40 | Added | 565 | 1 | 7/1/10 |
| 58-33A-45 | Added | 565 | 1 | 7/1/10 |
| 58-33A-50 | Added | 565 | 1 | 7/1/10 |
| 58-33A-55 | Added | 565 | 1 | 7/1/10 |
| 58-33A-60 | Added | 565 | 1 | 7/1/10 |
| 58-33A-65 | Added | 565 | 1 | 7/1/10 |
| 58-33A-70 | Added | 565 | 1 | 7/1/10 |
| 58-33A-75 | Added | 565 | 1 | 7/1/10 |
| 58-33A-80 | Added | 565 | 1 | 7/1/10 |
| 58-33A-90 | Added | 565 | 1 | 7/1/10 |
| 58-33A-95 | Added | 565 | 1 | 7/1/10 |
| 58-33-10 | Amended | 566 | 1 | |
| 58-33-26 | Amended | 383 | 1 | |

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| 58-33-26 | Amended | 566 | 2 | |
| 58-33-26 | Amended | 566 | 3 | |
| 58-33-30 | Amended | 566 | 6 | |
| 58-33-32 | Amended | 566 | 5 | |
| 58-33-35 | Repealed | 566 | 6 | |
| 58-33-40 | Amended | 383 | 3 | |
| 58-33-40 | Amended | 566 | 7 | |
| 58-33-40 | Amended | 566 | 8 | |
| 58-33-40 | Amended | 566 | 9 | |
| 58-33-46 | Amended | 566 | 10 | |
| 58-33-48 | Added | 566 | 4 | 10/1/10 |
| 58-35-5 | Amended | 451 | 21.2 | |
| 58-35-22 | Added | 566 | 19 | |
| 58-36-10 | Amended | 472 | 2 | |
| 58-36-15 | Amended | 472 | 3 | |
| 58-36-20 | Amended | 472 | 4 | |
| 58-36-120 | Added | 472 | 5 | |
| 58-39-75 | Amended | 566 | 24 | 10/1/10 |
| 58-44-15 | Repealed | 171 | 6 | |
| 58-44-16 | Added | 171 | 1 | |
| 58-44-20 | Amended | 171 | 4 | |
| 58-44-25 | Amended | 171 | 3 | |
| 58-44-30 | Amended | 171 | 2 | |
| 58-45-1 | Amended | 472 | 1 | |
| 58-45-5 | Amended | 472 | 1 | |
| 58-45-15 | Amended | 472 | 1 | |
| 58-45-25 | Amended | 472 | 1 | |
| 58-45-30 | Amended | 472 | 1 | |
| 58-45-41 | Added | 472 | 1 | |
| 58-45-45 | Amended | 472 | 1 | |
| 58-45-47 | Added | 472 | 1 | |
| 58-45-65.1 | Added | 472 | 1 | |
| 58-45-70 | Amended | 472 | 1 | |
| 58-45-71 | Added | 472 | 1 | |
| 58-45-85 | Amended | 472 | 1 | |
| 58-45-95 | Added | 472 | 1 | |
| 58-45-96 | Added | 472 | 1 | |
| 58-46-55 | Amended | 472 | 6 | |
| 58-47-205 | Amended | 172 | 4 | |
| 58-48-35 | Amended | 130 | 1 | |
| 58-50-75 | Amended | 382 | 24 | |
| 58-50-79 | Amended | 382 | 25 | |
| 58-50-80 | Amended | 382 | 26 | |
| 58-50-80 | Amended | 382 | 27 | |
| 58-50-82 | Amended | 382 | 28 | |
| 58-50-82 | Amended | 382 | 29 | |
| 58-50-82 | Amended | 382 | 30 | |
| 58-50-85 | Amended | 382 | 31 | |
| 58-50-90 | Amended | 382 | 32 | |
| 58-50-94 | Amended | 382 | 33 | |
| 58-50-180 | Amended | 286 | 1 | |
| 58-50-180 | Amended | 570 | 8 | |
| 58-50-270 | Amended | 487 | 2 | |
| 58-50-270 | Added | 352 | 1 | |
| 58-50-275 | Amended | 487 | 2 | |
| 58-50-275 | Added | 352 | 1 | |
| 58-50-280 | Amended | 487 | 2 | |
| 58-50-280 | Added | 352 | 1 | |
| 58-50-285 | Added | 352 | 1 | |

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| § | Effect | Chapter | Section | Date |
| 58-51-15 | Amended | 382 | 8 | |
| 58-51-17 | Amended | 382 | 1 | |
| 58-51-17 | Amended | 382 | 9 | |
| 58-51-17 | Amended | 382 | 10 | |
| 58-51-25 | Amended | 382 | 17 | |
| 58-51-50 | Amended | 382 | 20 | |
| 58-51-59 | Amended | 170 | 1 | |
| 58-53-41 | Added | 62 | 1 | |
| 58-54-45 | Amended | 382 | 11 | |
| 58-55-35 | Amended | 462 | 4 | |
| 58-56-26 | Amended | 382 | 12 | |
| 58-56-26 | Amended | 382 | 13 | |
| 58-56-51 | Amended | 451 | 21.16 | |
| 58-57-100 | Amended | 382 | 34 | |
| 58-58-97 | Added | 566 | 23 | 10/1/10 |
| 58-58-146 | Amended | 382 | 14 | |
| 58-58-210 | Amended | 451 | 21.17 | |
| 58-60-170 | Amended | 382 | 36 | |
| 58-62-16 | Amended | 448 | 1 | |
| 58-62-21 | Amended | 448 | 2 | |
| 58-62-21 | Amended | 448 | 3 | |
| 58-62-21 | Amended | 448 | 4 | |
| 58-63-75 | Added | 382 | 15 | |
| 58-64-5 | Amended | 451 | 21.9 | |
| 58-64-30 | Amended | 451 | 21.9 | |
| 58-65-1 | Amended | 451 | 21.13 | |
| 58-65-2 | Amended | 382 | 6 | |
| 58-65-2 | Amended | 384 | 3 | |
| 58-65-55 | Amended | 451 | 21.13 | |
| 58-65-75 | Amended | 382 | 21 | |
| 58-65-94 | Amended | 170 | 2 | |
| 58-65-133 | Amended | 570 | 8 | |
| 58-67-50 | Amended | 173 | 1 | |
| 58-67-70 | Amended | 382 | 22 | |
| 58-67-78 | Amended | 170 | 3 | |
| 58-67-160 | Amended | 451 | 21.10 | |
| 58-67-171 | Amended | 382 | 7 | |
| 58-67-171 | Amended | 384 | 4 | |
| 58-68-25 | Amended | 382 | 2 | |
| 58-68-25 | Amended | 382 | 3 | |
| 58-68-30 | Amended | 382 | 4 | |
| 58-68-30 | Amended | 382 | 23 | |
| 58-68-60 | Amended | 382 | 5 | |
| 58-69-10 | Amended | 451 | 21.6 | |
| 58-69-60 | Added | 566 | 18 | |
| 58-70-5 | Amended | 566 | 21 | |
| 58-70-6 | Added | 566 | 22 | |
| 58-70-15 | Amended | 573 | 4 | |
| 58-70-35 | Amended | 451 | 21.5 | |
| 58-70-40 | Amended | 566 | 16 | |
| 58-70-40 | Amended | 566 | 17 | |
| 58-70-70 | Amended | 573 | 4 | |
| 58-70-110 | Amended | 302 | 4 | |
| 58-70-115 | Amended | 573 | 5 | |
| 58-70-130 | Amended | 573 | 6 | |
| 58-70-145 | Added | 573 | 8 | |
| 58-70-150 | Added | 573 | 8 | |
| 58-70-155 | Added | 573 | 8 | |
| 58-71-45 | Amended | 536 | 1 | |

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|---|---|---|---|---|
| 58-71-45 | Amended | 566 | 14 | |
| 58-71-50 | Amended | 536 | 2 | |
| 58-71-50 | Amended | 566 | 12 | |
| 58-71-51 | Added | 536 | 3 | |
| 58-71-55 | Amended | 451 | 21.7 | |
| 58-71-70 | Amended | 566 | 13 | |
| 58-71-75 | Amended | 536 | 4 | |
| 58-71-80 | Amended | 536 | 5 | |
| 58-71-120 | Amended | 566 | 15 | |
| 58-72-50 | Amended | 570 | 35 | |
| 58-82A-1 | Added | 507 | 3 | 2/1/10 |
| 58-82A-2 | Added | 507 | 3 | 2/1/10 |
| 58-82A-3 | Added | 507 | 3 | 2/1/10 |
| 58-86-25 | Amended | 66 | 2 | |
| 58-86-30 | Amended | 66 | 2 | |
| 58-86-35 | Amended | 66 | 2 | |
| 58-86-40 | Amended | 66 | 2 | |
| 58-86-45 | Amended | 66 | 2 | |
| 58-86-50 | Repealed | 66 | 2 | |
| 58-86-60 | Amended | 66 | 2 | |
| 58-86-60 | Amended | 365 | 1 | |
| 58-89A-31 | Amended | 552 | 4 | |
| 58-89A-50 | Amended | 552 | 1 | |
| 58-89A-75 | Amended | 570 | 9 | |
| 58-89A-105 | Amended | 552 | 2 | |
| 58-89A-106 | Added | 552 | 3 | |
| 58-89A-107 | Added | 552 | 3 | |
| 58-91-1 | Amended | 382 | 35 | |
| 58-91-5 | Amended | 382 | 35 | |
| 58-91-10 | Amended | 382 | 35 | |
| 58-91-15 | Amended | 382 | 35 | |
| 58-91-20 | Amended | 382 | 35 | |
| 58-91-25 | Amended | 382 | 35 | |
| 58-91-30 | Amended | 382 | 35 | |
| 58-91-35 | Amended | 382 | 35 | |
| 58-91-40 | Amended | 382 | 35 | |
| 58-91-45 | Amended | 382 | 35 | |
| 58-91-50 | Amended | 382 | 35 | |
| 58-91-55 | Amended | 382 | 35 | |
| 58-91-60 | Amended | 382 | 35 | |
| 58-91-65 | Amended | 382 | 35 | |
| 58-91-70 | Amended | 382 | 35 | |
| 58-91-75 | Amended | 382 | 35 | |
| 58-91-80 | Amended | 382 | 35 | |
| 58-92-15 | Amended | 490 | 1 | |
| 58-92-30 | Amended | 490 | 2 | |
| 62-54 | Amended | 122 | 2 | |
| 62-73.1 | Added | 238 | 5 | |
| 62-110 | Amended | 202 | 1 | |
| 62-110 | Amended | 279 | 1 | |
| 62-110.1 | Amended | 390 | 1 | |
| 62-113 | Amended | 80 | 1 | |
| 62-133.5 | Amended | 238 | 1 | |
| 62-133.5 | Amended | 238 | 2 | |
| 62-133.5 | Amended | 238 | 3 | |
| 62-133.5 | Amended | 238 | 4 | |
| 62-133.5 | Amended | 570 | 36 | |
| 62-133.8 | Amended | 475 | 14 | |
| 62-133.10 | Added | 390 | 2 | |

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| | | Chapter | Section | |
| 62-157 | Amended | 451 | 10.56 | |
| 62-159.1 | Added | 302 | 1 | |
| 62-302 | Amended | 238 | 6 | |
| 62-350 | Added | 278 | 1 | |
| 63-34 | Amended | 421 | 3 | |
| 66-11 | Amended | 200 | 1 | |
| 66-12 | Amended | 230 | 1 | |
| 66-16 | Amended | 230 | 2 | |
| 66-16.1 | Added | 230 | 3 | |
| 66-58 | Amended | 207 | 1 | |
| 66-58 | Amended | 281 | 1 | |
| 66-58 | Amended | 329 | 2.1 | |
| 66-58 | Amended | 329 | 2.2 | |
| 66-58 | Amended | 475 | 9 | |
| 66-164 | Amended | 482 | 1 | |
| 66-165 | Amended | 482 | 2 | |
| 66-166 | Repealed | 482 | 3 | |
| 66-169 | Amended | 482 | 4 | |
| 66-170 | Amended | 482 | 5 | |
| 74C-3 | Amended | 328 | 1 | |
| 74C-7 | Amended | 328 | 2 | |
| 74C-8 | Amended | 328 | 3 | |
| 74C-8.1 | Added | 328 | 4 | |
| 74C-9 | Amended | 328 | 5 | |
| 74C-9 | Amended | 328 | 6 | |
| 74C-11 | Amended | 328 | 7 | |
| 74C-12 | Amended | 328 | 8 | |
| 74C-12 | Amended | 328 | 9 | |
| 74C-13 | Amended | 328 | 10 | |
| 74C-14 | Repealed | 328 | 11 | |
| 74C-23 | Added | 328 | 12 | |
| 74C-30 | Amended | 328 | 13 | |
| 74C-31 | Repealed | 328 | 14 | |
| 74C-32 | Repealed | 328 | 14 | |
| 74C-33 | Repealed | 328 | 14 | |
| 74D-2 | Amended | 328 | 15 | |
| 74D-2 | Amended | 557 | 1 | |
| 74D-2.1 | Added | 328 | 16 | |
| 74D-3 | Amended | 557 | 2 | |
| 74D-5.2 | Amended | 557 | 3 | |
| 74D-7 | Amended | 557 | 4 | |
| 74D-8 | Amended | 557 | 5 | |
| 74D-10 | Amended | 557 | 6 | |
| 74D-11 | Amended | 557 | 7 | |
| 74D-14 | Added | 557 | 8 | |
| 74D-30 | Amended | 557 | 9 | |
| 74D-30 | Amended | 557 | 10 | |
| 74D-31 | Repealed | 557 | 11 | |
| 74D-32 | Repealed | 557 | 11 | |
| 74D-33 | Repealed | 557 | 11 | |
| 75A-13.3 | Amended | 282 | 2 | 5/1/10 |
| 75A-16.2 | Added | 282 | 1 | 5/1/10 |
| 75-42 | Amended | 199 | 1 | |
| 75-54 | Amended | 302 | 5 | |
| 75-56 | Amended | 573 | 9 | |
| 75-63 | Amended | 355 | 1 | |
| 75-63 | Amended | 550 | 5 | |
| 75-65 | Amended | 355 | 2 | |
| 75-65 | Amended | 573 | 10 | |

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| 75-102 | Amended | 122 | 1 | |
| 75-104 | Amended | 364 | 1 | |
| 75-125 | Added | 284 | 1 | |
| 75-126 | Added | 284 | 1 | |
| 75-127 | Added | 284 | 1 | |
| 75-128 | Added | 284 | 1 | |
| 75-133 | Added | 355 | 7 | |
| 75-134 | Added | 355 | 7 | |
| 75-135 | Added | 355 | 7 | |
| 77-125 | Added | 345 | 1 | 7/1/10 |
| 77-126 | Added | 345 | 1 | 7/1/10 |
| 77-127 | Added | 345 | 1 | 7/1/10 |
| 77-128 | Added | 345 | 1 | 7/1/10 |
| 77-129 | Added | 345 | 1 | 7/1/10 |
| 77-130 | Added | 345 | 1 | 7/1/10 |
| 77-131 | Added | 345 | 1 | 7/1/10 |
| 77-132 | Added | 345 | 1 | 7/1/10 |
| 78A-37 | Amended | 451 | 24.1 | |
| 81A-52 | Amended | 87 | 1 | |
| 81A-61 | Amended | 87 | 2 | |
| 84-5.1 | Amended | 231 | 1 | |
| 84-17 | Amended | 82 | 1 | |
| 84-23 | Amended | 82 | 2 | |
| 86A-15 | Amended | 471 | 1 | |
| 87-58 | Amended | 333 | 1 | |
| 87-58 | Amended | 333 | 2 | |
| 87-59 | Amended | 333 | 3 | |
| 87-59 | Amended | 333 | 4 | |
| 87-61 | Amended | 333 | 5 | |
| 87-61.1 | Amended | 333 | 6 | |
| 87-63.1 | Added | 333 | 7 | |
| 87-64 | Amended | 333 | 8 | 1/1/12 |
| 87-97 | Amended | 124 | 1 | 10/1/10 |
| 87-97 | Amended | 124 | 3 | |
| 87-98.4 | Amended | 418 | 1 | |
| 88B-2 | Amended | 521 | 1.1 | 7/1/10 |
| 88B-6 | Amended | 471 | 2.1 | |
| 88B-6 | Amended | 471 | 2.2 | |
| 88B-6 | Amended | 521 | 1.2 | |
| 88B-10.1 | Added | 521 | 2 | 7/1/10 |
| 88B-11 | Amended | 521 | 3 | 7/1/10 |
| 88B-12 | Amended | 521 | 4 | 7/1/10 |
| 88B-13 | Amended | 521 | 5 | 7/1/10 |
| 88B-14 | Amended | 521 | 6 | 7/1/10 |
| 88B-18 | Amended | 521 | 7 | 7/1/10 |
| 88B-20 | Amended | 521 | 8 | 7/1/10 |
| 88B-21 | Amended | 521 | 9 | 7/1/10 |
| 88B-22 | Amended | 521 | 10 | 7/1/10 |
| 88B-23 | Amended | 521 | 11 | 7/1/10 |
| 88B-24 | Amended | 521 | 12 | 7/1/10 |
| 90-1.1 | Amended | 558 | 1.1 | |
| 90-5.2 | Amended | 217 | 2 | |
| 90-5.3 | Added | 217 | 3 | |
| 90-14 | Amended | 363 | 2 | |
| 90-14 | Amended | 363 | 3 | |
| 90-14 | Amended | 558 | 1.2 | |
| 90-14 | Amended | 558 | 1.3 | |
| 90-14 | Amended | 558 | 1.4 | |
| 90-14.2 | Amended | 558 | 2 | |

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| 90-14.5 | Amended | 558 | 3 | |
| 90-14.6 | Amended | 558 | 4 | |
| 90-14.8 | Amended | 558 | 5 | |
| 90-16 | Amended | 363 | 4 | |
| 90-16 | Amended | 558 | 6 | |
| 90-21.5 | Amended | 570 | 10 | |
| 90-21.14 | Amended | 424 | 1 | |
| 90-21.16 | Amended | 435 | 1 | |
| 90-36 | Amended | 289 | 1 | |
| 90-85.2 | Added | 423 | 1 | |
| 90-85.44 | Added | 423 | 2 | |
| 90-95 | Amended | 463 | 1 | |
| 90-95 | Amended | 463 | 2 | |
| 90-95 | Amended | 473 | 7 | |
| 90-96 | Amended | 510 | 8 | 10/1/10 |
| 90-96 | Amended | 510 | 8 | 10/1/10 |
| 90-96 | Amended | 577 | 6 | |
| 90-113.14 | Amended | 510 | 9 | 10/1/10 |
| 90-113.14 | Amended | 510 | 9 | 10/1/10 |
| 90-113.14 | Amended | 577 | 7 | |
| 90-113.73 | Amended | 438 | 1 | |
| 90-113.74 | Amended | 438 | 2 | |
| 90-113.80 | Added | 205 | 1 | |
| 90-113.81 | Added | 205 | 1 | |
| 90-113.82 | Added | 205 | 1 | |
| 90-113.83 | Added | 205 | 1 | |
| 90-113.84 | Added | 205 | 1 | |
| 90-129 | Repealed | 447 | 2 | |
| 90-130 | Repealed | 447 | 2 | |
| 90-131 | Repealed | 447 | 2 | |
| 90-132 | Repealed | 447 | 2 | |
| 90-133 | Repealed | 447 | 2 | |
| 90-134 | Repealed | 447 | 2 | |
| 90-136 | Repealed | 447 | 2 | |
| 90-137 | Repealed | 447 | 2 | |
| 90-138 | Repealed | 447 | 2 | |
| 90-171.23 | Amended | 133 | 1 | |
| 90-171.24 | Amended | 133 | 2 | |
| 90-171.34 | Amended | 133 | 3 | |
| 90-171.37 | Amended | 133 | 4 | |
| 90-171.38 | Amended | 133 | 5 | |
| 90-171.48 | Amended | 133 | 6 | |
| 90-270.47 | Amended | 393 | 1 | |
| 90-270.48A | Amended | 393 | 3 | |
| 90-270.48 | Amended | 393 | 2 | |
| 90-270.49 | Amended | 393 | 4 | |
| 90-270.51 | Amended | 393 | 5.1 | |
| 90-270.51 | Amended | 393 | 5.2 | |
| 90-270.54A | Added | 393 | 7 | |
| 90-270.54 | Amended | 393 | 6 | |
| 90-270.55A | Repealed | 393 | 9 | |
| 90-270.55 | Amended | 393 | 8 | |
| 90-270.56 | Amended | 393 | 10 | |
| 90-270.57 | Amended | 393 | 11 | |
| 90-270.58B | Amended | 393 | 13 | |
| 90-270.58C | Amended | 393 | 14 | |
| 90-270.58 | Amended | 393 | 12 | |
| 90-270.59 | Amended | 393 | 15 | |
| 90-270.60 | Amended | 393 | 16 | |

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| 90-270.63 | Added | 393 | 17 | |
| 90-270.78 | Amended | 570 | 11 | |
| 90-288.12 | Amended | 462 | 4 | |
| 90-288.13 | Amended | 462 | 4 | |
| 90-288.19 | Amended | 462 | 4 | |
| 90-295 | Amended | 138 | 1 | |
| 90-330 | Amended | 367 | 1 | |
| 90-331 | Amended | 367 | 2 | |
| 90-332.1 | Amended | 367 | 3 | |
| 90-333 | Amended | 367 | 4 | |
| 90-334 | Amended | 367 | 5 | |
| 90-336 | Amended | 367 | 6 | |
| 90-338 | Amended | 367 | 7 | |
| 90-340 | Amended | 367 | 8 | |
| 90-345 | Added | 367 | 9 | |
| 90-370 | Added | 271 | 1 | |
| 90-634 | Amended | 570 | 12 | |
| 90-721 | Added | 434 | 1 | |
| 90-721 | Added | 434 | 1 | |
| 90-722 | Added | 434 | 1 | |
| 90-723 | Added | 434 | 1 | |
| 90-724 | Added | 434 | 1 | |
| 90-725 | Added | 434 | 1 | |
| 90A-50 | Amended | 443 | 1 | |
| 90A-51 | Amended | 443 | 2 | |
| 90A-52 | Amended | 443 | 3 | |
| 90A-53 | Amended | 443 | 4 | |
| 90A-54 | Repealed | 443 | 5 | |
| 90A-55 | Amended | 443 | 6 | |
| 90A-56 | Amended | 443 | 7 | |
| 90A-57 | Amended | 443 | 8 | |
| 90A-59 | Amended | 443 | 9 | |
| 90A-60 | Repealed | 443 | 10 | |
| 90A-61 | Repealed | 443 | 10 | |
| 90A-62 | Amended | 443 | 11 | |
| 90A-63 | Amended | 443 | 12 | |
| 90A-64 | Amended | 443 | 13 | |
| 90A-65 | Amended | 443 | 14 | |
| 90A-67 | Added | 443 | 15 | |
| 90B-3 | Amended | 88 | 1 | |
| 90B-10 | Amended | 88 | 2 | |
| 90B-16 | Added | 88 | 3 | |
| 93B-2 | Amended | 125 | 2 | |
| 93B-4 | Amended | 125 | 3 | |
| 93B-5 | Amended | 125 | 4 | |
| 93B-15 | Amended | 458 | 1 | |
| 93-1 | Amended | 347 | 1 | |
| 93-3 | Amended | 347 | 2 | |
| 93-4 | Amended | 347 | 3 | |
| 93-10 | Amended | 347 | 4 | |
| 93-12 | Amended | 347 | 5 | |
| 94-12 | Added | 451 | 12.1 | |
| 95-14.1 | Added | 451 | 12.2 | |
| 95-25.5 | Amended | 21 | 2 | |
| 95-25.15 | Amended | 351 | 2 | |
| 95-25.23A | Amended | 351 | 3 | |
| 95-25.23C | Added | 139 | 1 | |
| 95-25.23 | Amended | 351 | 1 | |
| 95-138 | Amended | 351 | 4 | |

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| 95-139 | Amended | 351 | 5 | |
| 95-232 | Amended | 535 | 1 | |
| 95-241 | Amended | 205 | 2 | |
| 95-260 | Amended | 58 | 7 | |
| 96-8 | Amended | 101 | 1 | |
| 96-8 | Amended | 301 | 1 | |
| 96-8 | Amended | 366 | 1 | |
| 96-8 | Amended | 506 | 1 | |
| 96-8 | Amended | 506 | 2 | |
| 96-13 | Amended | 301 | 2 | |
| 96-14 | Amended | 101 | 2 | |
| 96-14 | Amended | 101 | 3 | |
| 96-14 | Amended | 301 | 3 | |
| 96-14 | Amended | 506 | 3 | |
| 97-2 | Amended | 281 | 1 | |
| 97-29 | Amended | 281 | 1 | |
| 97-73 | Amended | 451 | 14.16 | |
| 97-133 | Amended | 242 | 1 | |
| 97-165 | Amended | 172 | 5 | |
| 97-170 | Amended | 172 | 6 | |
| 97-180 | Amended | 172 | 7 | |
| 97-185 | Amended | 242 | 2 | |
| 97-185 | Amended | 242 | 3 | |
| 97-185 | Amended | 242 | 4 | |
| 99C | Amended | 353 | 1 | |
| 99C-1 | Amended | 353 | 1 | |
| 99C-2 | Amended | 353 | 1 | |
| 104E-9 | Amended | 451 | 13.3 | |
| 104E-19 | Amended | 451 | 13.3 | |
| 104-7 | Amended | 20 | 1 | |
| 105-40 | Amended | 550 | 5.1 | |
| 105-41 | Amended | 445 | 1 | |
| 105-113.4D | Amended | 451 | 27A.5 | |
| 105-113.4 | Amended | 559 | 1 | |
| 105-113.5 | Amended | 451 | 27A.5 | |
| 105-113.35 | Amended | 451 | 27A.5 | |
| 105-113.35 | Amended | 559 | 2 | |
| 105-113.37 | Amended | 559 | 3 | |
| 105-113.40A | Added | 451 | 27A.5 | |
| 105-113.80 | Amended | 451 | 27A.4 | |
| 105-113.81A | Repealed | 451 | 14.19 | |
| 105-113.82 | Amended | 451 | 27A.4 | |
| 105-122 | Amended | 422 | 1 | |
| 105-122 | Amended | 445 | 2 | |
| 105-129.15 | Amended | 548 | 1 | |
| 105-129.16A | Amended | 548 | 2 | |
| 105-129.17 | Amended | 548 | 3 | |
| 105-129.27 | Amended | 445 | 3 | |
| 105-129.83 | Amended | 54 | 3 | |
| 105-130.3B | Added | 451 | 27A.1 | |
| 105-130.4 | Amended | 54 | 1 | |
| 105-130.4 | Amended | 54 | 2 | |
| 105-130.4 | Amended | 54 | 6 | 1/1/19 |
| 105-130.4 | Amended | 445 | 4 | |
| 105-130.4 | Amended | 445 | 5 | |
| 105-130.5 | Amended | 451 | 27A.6 | |
| 105-130.16 | Amended | 445 | 6 | |
| 105-130.18 | Repealed | 445 | 7 | |
| 105-130.34 | Amended | 445 | 9 | |

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| 105-130.47 | Amended | 445 | 8 | |
| 105-130.47 | Amended | 529 | 1 | |
| 105-134.2A | Added | 451 | 27A.1 | |
| 105-134.6 | Amended | 445 | 43 | |
| 105-134.6 | Amended | 451 | 27A.6 | |
| 105-134.6 | Amended | 451 | 27A.6 | |
| 105-151.12 | Amended | 445 | 9 | |
| 105-151.29 | Amended | 445 | 8 | |
| 105-151.29 | Amended | 529 | 2 | |
| 105-156 | Repealed | 445 | 7 | |
| 105-163.1 | Amended | 476 | 1 | |
| 105-163.3 | Amended | 476 | 2 | |
| 105-163.011 | Amended | 445 | 9 | |
| 105-163.012 | Amended | 445 | 9 | |
| 105-164.3 | Amended | 445 | 11 | |
| 105-164.3 | Amended | 451 | 27A.3 | |
| 105-164.3 | Amended | 451 | 27A.3 | |
| 105-164.4B | Amended | 445 | 12 | |
| 105-164.4 | Amended | 451 | 27A.2 | |
| 105-164.4 | Amended | 451 | 27A.3 | |
| 105-164.6A | Amended | 451 | 27A.3 | |
| 105-164.6 | Amended | 451 | 27A.3 | |
| 105-164.7 | Amended | 451 | 27A.3 | |
| 105-164.8 | Amended | 451 | 27A.3 | |
| 105-164.11 | Amended | 413 | 1 | |
| 105-164.13B | Amended | 445 | 42 | |
| 105-164.13 | Amended | 451 | 27A.3 | |
| 105-164.13 | Amended | 451 | 27A.3 | |
| 105-164.13 | Amended | 511 | 1 | |
| 105-164.14 | Amended | 233 | 1 | |
| 105-164.14 | Amended | 445 | 13 | |
| 105-164.14 | Amended | 445 | 14 | |
| 105-164.14 | Amended | 527 | 2 | |
| 105-164.14 | Amended | 550 | 4.1 | |
| 105-164.15A | Amended | 451 | 27A.3 | |
| 105-164.16 | Amended | 451 | 27A.3 | |
| 105-164.22 | Amended | 451 | 27A.3 | |
| 105-164.23 | Repealed | 451 | 27A.3 | |
| 105-164.24 | Repealed | 451 | 27A.3 | |
| 105-164.25 | Repealed | 451 | 27A.3 | |
| 105-164.26 | Amended | 451 | 27A.3 | |
| 105-164.27A | Amended | 451 | 27A.3 | |
| 105-164.28A | Amended | 451 | 27A.3 | |
| 105-164.28 | Amended | 451 | 27A.3 | |
| 105-164.29 | Amended | 451 | 27A.3 | |
| 105-164.31 | Repealed | 451 | 27A.3 | |
| 105-164.32 | Amended | 451 | 27A.3 | |
| 105-164.44E | Amended | 483 | 6 | |
| 105-164.44E | Amended | 483 | 8 | |
| 105-164.44F | Amended | 451 | 27A.2 | |
| 105-164.44G | Amended | 445 | 15 | |
| 105-164.44I | Amended | 451 | 27A.2 | |
| 105-187.3 | Amended | 550 | 2 | |
| 105-187.6 | Amended | 81 | 2 | |
| 105-187.6 | Amended | 445 | 16 | |
| 105-187.19 | Amended | 451 | 13.3B | |
| 105-187.30 | Amended | 483 | 5 | |
| 105-187.31 | Amended | 483 | 5 | |
| 105-187.31 | Amended | 483 | 6 | |

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| 105-187.32 | Amended | 483 | 5 | |
| 105-187.33 | Amended | 483 | 5 | |
| 105-187.34 | Amended | 483 | 5 | |
| 105-187.35 | Added | 483 | 9 | |
| 105-187.50 | Amended | 451 | 27A.3 | |
| 105-187.51C | Amended | 445 | 17 | |
| 105-187.63 | Amended | 484 | 4 | |
| 105-228.5B | Amended | 445 | 10 | |
| 105-228.32 | Amended | 454 | 2 | |
| 105-228.90 | Amended | 451 | 27A.6 | |
| 105-259 | Amended | 283 | 1 | |
| 105-259 | Amended | 445 | 39 | |
| 105-259 | Amended | 483 | 5 | |
| 105-259 | Amended | 483 | 10 | |
| 105-269.14 | Amended | 451 | 27A.3 | |
| 105-273 | Amended | 308 | 1 | 7/1/10 |
| 105-273 | Amended | 445 | 20 | |
| 105-275 | Amended | 445 | 21 | |
| 105-277.1B | Amended | 445 | 22 | |
| 105-277.1C | Amended | 445 | 22 | |
| 105-277.1D | Added | 308 | 2 | 7/1/10 |
| 105-277.1F | Amended | 308 | 3 | 7/1/10 |
| 105-277.1 | Amended | 445 | 22 | |
| 105-277.14 | Amended | 445 | 23 | |
| 105-277.17 | Added | 481 | 1 | 7/1/10 |
| 105-278.6 | Amended | 481 | 2 | 7/1/10 |
| 105-282.1 | Amended | 445 | 23 | 7/1/10 |
| 105-282.1 | Amended | 481 | 3 | 7/1/10 |
| 105-317.2 | Added | 454 | 1 | |
| 105-330 | Amended | 445 | 24 | 7/1/11 |
| 105-330.1 | Amended | 445 | 24 | 7/1/11 |
| 105-330.2 | Amended | 445 | 24 | 7/1/11 |
| 105-330.3 | Amended | 445 | 24 | 7/1/11 |
| 105-330.4 | Amended | 445 | 24 | 7/1/11 |
| 105-330.5 | Amended | 445 | 24 | 7/1/11 |
| 105-330.5 | Amended | 445 | 25 | |
| 105-330.8 | Amended | 445 | 24 | 7/1/11 |
| 105-330.9 | Amended | 445 | 24 | |
| 105-330.10 | Amended | 445 | 25 | |
| 105-330.11 | Amended | 445 | 24 | |
| 105-361 | Amended | 445 | 26 | |
| 105-449.45 | Amended | 445 | 31 | |
| 105-449.47A | Amended | 445 | 32 | |
| 105-449.72 | Amended | 445 | 33 | |
| 105-449.81 | Amended | 445 | 34 | |
| 105-449.83A | Amended | 445 | 34 | |
| 105-449.105B | Amended | 445 | 35 | |
| 105-449.115 | Amended | 445 | 36 | |
| 105-449.121 | Amended | 445 | 37 | |
| 105-449.136 | Amended | 445 | 38 | |
| 105-458 | Amended | 569 | 1 | |
| 105-459 | Amended | 569 | 2 | |
| 105-461 | Amended | 569 | 3 | |
| 105-487 | Amended | 395 | 1 | |
| 105-502 | Amended | 395 | 2 | |
| 105-506 | Amended | 527 | 2 | |
| 105-506 | Added | 527 | 2 | |
| 105-506.1 | Amended | 527 | 2 | |
| 105-506.2 | Amended | 527 | 2 | |

| *G.S.* | | *Session Laws* | | *Postponed Effective* |
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| 105-507 | Amended | 527 | 2 | |
| 105-507 | Added | 527 | 2 | |
| 105-507.1 | Amended | 527 | 2 | |
| 105-507.2 | Amended | 527 | 2 | |
| 105-507.3 | Amended | 527 | 2 | |
| 105-507.4 | Amended | 527 | 2 | |
| 105-508 | Added | 527 | 2 | |
| 105-508.1 | Added | 527 | 2 | |
| 105-508.2 | Added | 527 | 2 | |
| 105-509 | Added | 527 | 2 | |
| 105-509.1 | Added | 527 | 2 | |
| 105-510 | Added | 527 | 2 | |
| 105-510.1 | Added | 527 | 2 | |
| 105-511 | Added | 527 | 2 | |
| 105-511.1 | Added | 527 | 2 | |
| 105-511.2 | Added | 527 | 2 | |
| 105-511.3 | Added | 527 | 2 | |
| 105-511.4 | Added | 527 | 2 | |
| 105-523 | Amended | 399 | 4 | |
| 105-538 | Amended | 445 | 18 | |
| 105-561 | Amended | 527 | 3 | 7/1/10 |
| 105-561 | Amended | 527 | 3 | 7/1/10 |
| 105-562 | Amended | 527 | 5 | |
| 105-563 | Amended | 527 | 5 | |
| 105-570 | Added | 527 | 4 | |
| 106-6.1 | Amended | 451 | 11.3 | |
| 106-277 | Amended | 455 | 1 | |
| 106-277.2 | Amended | 455 | 2 | |
| 106-277.5 | Amended | 455 | 3 | |
| 106-277.6 | Amended | 455 | 4 | |
| 106-277.7 | Amended | 455 | 5 | |
| 106-277.9 | Amended | 455 | 6 | |
| 106-277.10 | Amended | 455 | 7 | |
| 106-277.10 | Amended | 455 | 8 | |
| 106-277.23 | Amended | 455 | 9 | |
| 106-277.25 | Amended | 455 | 10 | |
| 106-277.28 | Amended | 455 | 11 | |
| 106-399.4 | Amended | 103 | 1 | |
| 106-399.5 | Amended | 103 | 1 | |
| 106-400 | Amended | 103 | 1 | |
| 106-400.1 | Amended | 103 | 1 | |
| 106-401 | Amended | 103 | 1 | |
| 106-401.1 | Amended | 103 | 1 | |
| 106-402 | Amended | 103 | 1 | |
| 106-402.1 | Amended | 103 | 1 | |
| 106-403 | Amended | 103 | 1 | |
| 106-404 | Amended | 103 | 1 | |
| 106-405 | Amended | 103 | 1 | |
| 106-549.39 | Amended | 102 | 1 | |
| 106-549.51A | Repealed | 102 | 2 | |
| 106-549.62 | Amended | 102 | 3 | |
| 106-549.62 | Amended | 102 | 4 | |
| 106-671 | Amended | 451 | 11.1 | |
| 106-744 | Amended | 303 | 1 | |
| 106-744 | Amended | 303 | 2 | |
| 106-744 | Amended | 303 | 3 | |
| 106-744 | Amended | 484 | 12 | |
| 106-830 | Added | 530 | 1 | |
| 106-831 | Added | 530 | 1 | |

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| § | Effect | Chapter | Section | Date |
| 106-832 | Added | 530 | 1 |  |
| 106-833 | Added | 530 | 1 |  |
| 108A-24 | Amended | 489 | 1 |  |
| 108A-27 | Amended | 489 | 2 |  |
| 108A-27.2 | Amended | 489 | 3 |  |
| 108A-27.3 | Amended | 489 | 4 |  |
| 108A-27.4 | Amended | 489 | 5 |  |
| 108A-27.5 | Amended | 489 | 6 |  |
| 108A-27.6 | Amended | 489 | 7 |  |
| 108A-27.7 | Amended | 489 | 8 |  |
| 108A-27.8 | Amended | 489 | 9 |  |
| 108A-27.9 | Amended | 489 | 10 |  |
| 108A-27.13 | Amended | 489 | 11 |  |
| 108A-29 | Amended | 489 | 12 |  |
| 108A-29.1 | Amended | 489 | 13 |  |
| 108A-50.2 | Added | 451 | 10.48 |  |
| 108A-54.1 | Amended | 451 | 10.69 |  |
| 108A-54.2 | Amended | 451 | 10.68A |  |
| 108A-54.3 | Added | 451 | 10.32 |  |
| 108A-57 | Amended | 16 | 4 |  |
| 108A-63 | Amended | 554 | 3 |  |
| 108A-63.1 | Added | 554 | 2 |  |
| 108A-70.21 | Amended | 16 | 4 |  |
| 108A-70.21 | Amended | 451 | 10.35 |  |
| 110-88 | Amended | 187 | 2 |  |
| 110-90 | Amended | 123 | 2 |  |
| 110-90 | Amended | 451 | 10.11 |  |
| 110-91 | Amended | 64 | 1 |  |
| 110-91 | Amended | 244 | 1 |  |
| 110-129.1 | Amended | 451 | 10.46 |  |
| 110-141 | Amended | 451 | 10.46A |  |
| 113-35.1 | Repealed | 484 | 5 |  |
| 113-44.15 | Amended | 484 | 13 |  |
| 113-77.9 | Amended | 484 | 14 |  |
| 113-129 | Amended | 89 | 2 |  |
| 113-133.1 | Amended | 89 | 1 |  |
| 113-168.4 | Amended | 433 | 1 |  |
| 113-169.2 | Amended | 433 | 2 |  |
| 113-201 | Amended | 433 | 3 |  |
| 113-202 | Amended | 433 | 4 |  |
| 113-202 | Amended | 433 | 5 |  |
| 113-203 | Amended | 433 | 6 |  |
| 113-207 | Amended | 433 | 7 |  |
| 113-270.3 | Amended | 214 | 1 |  |
| 113-276 | Amended | 25 | 1 |  |
| 113-276 | Amended | 248 | 1 |  |
| 113-291.1 | Amended | 221 | 2 |  |
| 113-291.1 | Amended | 221 | 3 |  |
| 113-291.2 | Amended | 221 | 1 |  |
| 113-291.6 | Amended | 120 | 1 |  |
| 113-291.9 | Amended | 120 | 2 |  |
| 113-291.10 | Amended | 451 | 13.10 |  |
| 113-300.6 | Amended | 15 | 1 |  |
| 113-300.7 | Amended | 15 | 2 |  |
| 113-333 | Amended | 219 | 1 |  |
| 113-351 | Amended | 462 | 4 |  |
| 113A-192 | Amended | 451 | 13.9 |  |
| 113B-2 | Amended | 446 | 3 |  |
| 113B-3 | Amended | 446 | 4 |  |

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|---|---|---|---|---|
| 113B-4 | Amended | 446 | 5 | |
| 113B-6 | Amended | 446 | 6 | |
| 113B-10 | Repealed | 446 | 7 | |
| 113B-11 | Amended | 446 | 8 | |
| 113B-12 | Amended | 446 | 9 | |
| 114-10.01 | Amended | 544 | 1 | |
| 114-10.02 | Added | 106 | 1 | |
| 114-19.16 | Amended | 570 | 32 | |
| 114-19.26 | Added | 367 | 10 | |
| 114-19.27 | Added | 393 | 18 | |
| 114-50 | Added | 265 | 1 | |
| 114-51 | Added | 265 | 1 | |
| 114-52 | Added | 265 | 1 | |
| 114-53 | Added | 265 | 1 | |
| 114-54 | Added | 265 | 1 | |
| 114-55 | Added | 265 | 1 | |
| 115B-2 | Amended | 451 | 8.11 | |
| 115B-2.1 | Repealed | 451 | 8.11 | |
| 115B-5 | Amended | 451 | 8.11 | |
| 115B-5.1 | Amended | 570 | 13 | |
| 115C-10 | Amended | 2 | 1 | 3/4/09 |
| 115C-12 | Amended | 305 | 4 | |
| 115C-12 | Amended | 334 | 1 | |
| 115C-12 | Amended | 451 | 7.39 | |
| 115C-37.1 | Amended | 277 | 1 | |
| 115C-37.1 | Amended | 277 | 2 | 12/1/10 |
| 115C-47 | Amended | 223 | 1 | |
| 115C-47 | Amended | 330 | 2 | |
| 115C-47 | Amended | 403 | 2 | |
| 115C-47 | Amended | 410 | 2 | |
| 115C-47 | Amended | 451 | 7.28 | |
| 115C-47 | Amended | 541 | 29 | |
| 115C-50 | Amended | 403 | 3 | |
| 115C-72 | Amended | 570 | 27 | |
| 115C-81 | Amended | 60 | 1 | |
| 115C-81 | Amended | 213 | 2 | |
| 115C-81 | Amended | 213 | 3 | |
| 115C-81 | Amended | 213 | 4 | |
| 115C-81 | Amended | 213 | 5 | |
| 115C-81 | Amended | 213 | 6 | |
| 115C-81 | Amended | 213 | 7 | |
| 115C-81 | Amended | 213 | 8 | |
| 115C-81 | Amended | 213 | 9 | |
| 115C-81 | Amended | 236 | 1 | |
| 115C-81 | Amended | 504 | 1 | |
| 115C-81 | Amended | 541 | 28 | |
| 115C-81.4 | Added | 59 | 1 | |
| 115C-102.5 | Amended | 451 | 7.31 | |
| 115C-102.6A | Amended | 451 | 7.31 | |
| 115C-102.6B | Amended | 451 | 7.31 | |
| 115C-102.6B | Amended | 570 | 37 | |
| 115C-102.6C | Amended | 451 | 7.31 | |
| 115C-102.6D | Amended | 451 | 7.31 | |
| 115C-102.6 | Amended | 451 | 7.31 | |
| 115C-102.7 | Amended | 451 | 7.31 | |
| 115C-102.15 | Amended | 570 | 8 | |
| 115C-102.15 | Repealed | 451 | 7.15 | |
| 115C-105.27 | Amended | 223 | 2 | |
| 115C-105.37A | Amended | 223 | 3 | |

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| 115C-105.41 | Amended | 542 | 1 | |
| 115C-174.10 | Amended | 451 | 7.20 | |
| 115C-174.11 | Amended | 451 | 7.20 | |
| 115C-174.12 | Amended | 451 | 7.20 | |
| 115C-207 | Amended | 453 | 1 | |
| 115C-238.29F | Amended | 239 | 1 | |
| 115C-238.29F | Amended | 563 | 2 | |
| 115C-238.55 | Amended | 305 | 3 | |
| 115C-254 | Amended | 281 | 1 | |
| 115C-285 | Amended | 451 | 7.22 | |
| 115C-288 | Amended | 410 | 1 | |
| 115C-296 | Amended | 59 | 2 | |
| 115C-296.2 | Amended | 451 | 7.30 | 7/1/10 |
| 115C-296.2 | Amended | 451 | 7.41 | 1/1/11 |
| 115C-296.2 | Amended | 575 | 3H | |
| 115C-296.5 | Amended | 451 | 9.13 | |
| 115C-296.6 | Amended | 451 | 9.13 | |
| 115C-302.1 | Amended | 451 | 7.35 | |
| 115C-324 | Amended | 570 | 38 | |
| 115C-325 | Amended | 326 | 1 | |
| 115C-336 | Amended | 144 | 1 | |
| 115C-366 | Amended | 331 | 1 | |
| 115C-366 | Amended | 331 | 2 | |
| 115C-375.3 | Amended | 563 | 1 | |
| 115C-375.5 | Amended | 330 | 3 | |
| 115C-378 | Amended | 404 | 1 | |
| 115C-391 | Amended | 61 | 1 | |
| 115C-407.5 | Amended | 281 | 1 | |
| 115C-407.15 | Amended | 570 | 39 | |
| 115C-407.15 | Added | 212 | 1 | |
| 115C-407.16 | Amended | 570 | 39 | |
| 115C-407.16 | Added | 212 | 1 | |
| 115C-407.17 | Amended | 570 | 39 | |
| 115C-407.17 | Added | 212 | 1 | |
| 115C-407.18 | Amended | 570 | 39 | |
| 115C-407.18 | Added | 212 | 1 | |
| 115C-458 | Amended | 451 | 7.37 | |
| 115C-460 | Repealed | 451 | 7.37 | |
| 115C-461 | Repealed | 451 | 7.37 | |
| 115C-462 | Repealed | 451 | 7.37 | |
| 115C-463 | Repealed | 451 | 7.37 | |
| 115C-464 | Repealed | 451 | 7.37 | |
| 115C-465 | Repealed | 451 | 7.37 | |
| 115C-466 | Repealed | 451 | 7.37 | |
| 115C-467 | Repealed | 451 | 7.37 | |
| 115C-472.5 | Repealed | 451 | 7.36 | |
| 115C-489.5 | Amended | 140 | 1 | |
| 115C-489.6 | Amended | 140 | 1 | |
| 115C-521 | Amended | 59 | 3 | |
| 115C-521.1 | Added | 123 | 1 | |
| 115C-525 | Amended | 570 | 40 | |
| 115D-1.1 | Amended | 46 | 1 | |
| 115D-1.2 | Amended | 451 | 7.10 | |
| 115D-4 | Amended | 229 | 1 | |
| 115D-5 | Amended | 208 | 1 | |
| 115D-5 | Amended | 451 | 8.8 | |
| 115D-5 | Amended | 451 | 8.9 | |
| 115D-5 | Amended | 451 | 8.11 | 7/1/10 |
| 115D-5 | Amended | 570 | 42 | |

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| 115D-5 | Amended | 575 | 5 | |
| 115D-5.1 | Amended | 451 | 8.14 | |
| 115D-5.1 | Amended | 523 | 2 | |
| 115D-5.1 | Amended | 570 | 41 | |
| 115D-9 | Added | 229 | 2 | |
| 115D-12 | Amended | 549 | 19 | |
| 115D-20 | Amended | 119 | 1 | |
| 115D-40.1 | Amended | 451 | 8.4 | |
| 115D-41 | Amended | 206 | 1 | |
| 115D-58.14 | Amended | 132 | 1 | |
| 115D-93 | Amended | 562 | 1 | 7/1/10 |
| 115D-95 | Amended | 562 | 2 | 7/1/10 |
| 115D-95.1 | Added | 562 | 4 | 7/1/10 |
| 115D-96 | Amended | 562 | 3 | 7/1/10 |
| 116-21.2 | Amended | 451 | 9.8 | |
| 116-21.5 | Repealed | 451 | 9.15 | |
| 116-21.6 | Added | 451 | 9.15 | |
| 116-29.1 | Amended | 451 | 27A.5 | |
| 116-29.5 | Repealed | 209 | 3 | |
| 116-30.7 | Amended | 451 | 9.11 | |
| 116-36 | Amended | 8 | 5 | |
| 116-43.15 | Amended | 305 | 5 | |
| 116-143 | Amended | 451 | 9.21 | |
| 116-143 | Amended | 451 | 9.22 | |
| 116-143.7 | Amended | 451 | 9.10 | |
| 116-143.7 | Added | 451 | 9.10 | |
| 116-212 | Amended | 281 | 1 | |
| 116-220 | Amended | 136 | 4 | |
| 116-238.1 | Amended | 451 | 9.6 | |
| 116B-60 | Amended | 177 | 1 | |
| 116B-62 | Amended | 312 | 1 | |
| 116B-78 | Amended | 312 | 2 | |
| 119-56 | Amended | 386 | 1 | |
| 119-57 | Amended | 386 | 2 | |
| 119-59 | Amended | 386 | 3 | |
| 119-61 | Amended | 386 | 4 | |
| 120-2 | Amended | 78 | 1 | |
| 120-4.8 | Amended | 66 | 6 | |
| 120-4.12 | Amended | 281 | 1 | |
| 120-4.21 | Amended | 66 | 12 | |
| 120-4.22 | Amended | 66 | 3 | |
| 120-4.25 | Amended | 66 | 11 | |
| 120-4.26A | Amended | 66 | 11 | |
| 120-4.27 | Amended | 66 | 6 | |
| 120-4.31 | Amended | 66 | 1 | |
| 120-70.61 | Amended | 484 | 9 | |
| 120-70.101 | Amended | 125 | 1 | |
| 120-70.103 | Repealed | 125 | 5 | |
| 120-70.105 | Amended | 574 | 51.1 | |
| 120-99 | Amended | 10 | 1 | |
| 120-100 | Amended | 10 | 2 | |
| 120-103.1 | Amended | 549 | 1 | |
| 120-134 | Amended | 129 | 2 | |
| 120-182 | Amended | 142 | 1 | |
| 120-217 | Amended | 142 | 2 | |
| 120C-100 | Amended | 129 | 3 | |
| 120C-102 | Amended | 570 | 14 | |
| 120C-103 | Amended | 549 | 2 | |
| 120C-200 | Amended | 549 | 3 | |

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| 120C-206 | Amended | 549 | 4 | |
| 120C-210 | Added | 549 | 5 | |
| 120C-401 | Amended | 477 | 1 | |
| 120C-401 | Amended | 549 | 7 | |
| 120C-800 | Amended | 549 | 7 | |
| 121-5 | Amended | 451 | 20B.3 | |
| 122A-5 | Amended | 570 | 15 | |
| 122C-23 | Amended | 451 | 10.76 | |
| 122C-26 | Amended | 361 | 1 | |
| 122C-31 | Amended | 299 | 1 | |
| 122C-31 | Amended | 299 | 2 | |
| 122C-31 | Amended | 299 | 3 | |
| 122C-31 | Amended | 299 | 4 | |
| 122C-52 | Amended | 299 | 5 | |
| 122C-54 | Amended | 299 | 6 | |
| 122C-55 | Amended | 65 | 1 | |
| 122C-55 | Amended | 65 | 1 | |
| 122C-55 | Amended | 487 | 5 | |
| 122C-55 | Amended | 570 | 43 | |
| 122C-64 | Amended | 190 | 1 | |
| 122C-112.1 | Amended | 186 | 2 | |
| 122C-115.4 | Amended | 186 | 1 | |
| 122C-117 | Amended | 191 | 1 | |
| 122C-171 | Amended | 50 | 1 | |
| 122C-261 | Amended | 315 | 1 | |
| 122C-261 | Amended | 340 | 1 | |
| 122C-263 | Amended | 315 | 2 | |
| 122C-263 | Amended | 340 | 2 | |
| 122C-272 | Amended | 570 | 27 | |
| 122C-430.30 | Added | 315 | 3 | |
| 126-5 | Amended | 451 | 9.13 | |
| 127A-2 | Amended | 281 | 1 | |
| 127A-3 | Amended | 281 | 1 | |
| 127A-9 | Amended | 281 | 1 | |
| 127A-10 | Amended | 281 | 1 | |
| 127A-17.1 | Amended | 281 | 1 | |
| 127A-18 | Amended | 281 | 1 | |
| 127A-19 | Amended | 281 | 1 | |
| 127A-21 | Amended | 281 | 1 | |
| 127A-22 | Amended | 281 | 1 | |
| 127A-23 | Amended | 281 | 1 | |
| 127A-29 | Amended | 281 | 1 | |
| 127A-30 | Amended | 281 | 1 | |
| 127A-31 | Amended | 281 | 1 | |
| 127A-32 | Amended | 281 | 1 | |
| 127A-34 | Amended | 281 | 1 | |
| 127A-35 | Amended | 281 | 1 | |
| 127A-36 | Amended | 281 | 1 | |
| 127A-37 | Amended | 281 | 1 | |
| 127A-38 | Amended | 281 | 1 | |
| 127A-39 | Amended | 281 | 1 | |
| 127A-40 | Amended | 66 | 10 | |
| 127A-40 | Amended | 281 | 1 | |
| 127A-40 | Amended | 451 | 26.21 | |
| 127A-41 | Amended | 281 | 1 | |
| 127A-41.2 | Amended | 281 | 1 | |
| 127A-42 | Amended | 281 | 1 | |
| 127A-43 | Amended | 281 | 1 | |
| 127A-45.1 | Amended | 281 | 1 | |

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| 127A-45.2 | Amended | 281 | 1 | |
| 127A-45.3 | Amended | 281 | 1 | |
| 127A-45.4 | Amended | 281 | 1 | |
| 127A-45.5 | Amended | 281 | 1 | |
| 127A-47 | Amended | 281 | 1 | |
| 127A-48 | Amended | 281 | 1 | |
| 127A-49 | Amended | 281 | 1 | |
| 127A-50 | Amended | 281 | 1 | |
| 127A-51 | Amended | 281 | 1 | |
| 127A-52 | Amended | 281 | 1 | |
| 127A-55 | Amended | 281 | 1 | |
| 127A-56 | Amended | 281 | 1 | |
| 127A-58 | Amended | 281 | 1 | |
| 127A-60 | Amended | 281 | 1 | |
| 127A-74 | Amended | 281 | 1 | |
| 127A-80 | Amended | 281 | 1 | |
| 127A-81 | Amended | 281 | 1 | |
| 127A-87 | Amended | 281 | 1 | |
| 127A-88 | Amended | 281 | 1 | |
| 127A-91 | Amended | 281 | 1 | |
| 127A-97 | Amended | 281 | 1 | |
| 127A-99 | Amended | 281 | 1 | |
| 127A-107 | Amended | 281 | 1 | |
| 127A-108 | Amended | 281 | 1 | |
| 127A-117 | Amended | 281 | 1 | |
| 127A-118 | Amended | 281 | 1 | |
| 127A-119 | Amended | 281 | 1 | |
| 127A-126 | Amended | 281 | 1 | |
| 127A-128 | Amended | 281 | 1 | |
| 127A-130 | Amended | 281 | 1 | |
| 127A-139 | Amended | 281 | 1 | |
| 127A-145 | Amended | 281 | 1 | |
| 127A-147 | Amended | 281 | 1 | |
| 127A-149 | Amended | 281 | 1 | |
| 127A-150 | Amended | 281 | 1 | |
| 127A-154 | Amended | 281 | 1 | |
| 127A-155 | Amended | 281 | 1 | |
| 127A-167 | Amended | 281 | 1 | |
| 127A-175 | Amended | 281 | 1 | |
| 127A-177 | Amended | 281 | 1 | |
| 127A-178 | Amended | 281 | 1 | |
| 127A-179 | Amended | 281 | 1 | |
| 127A-181 | Amended | 281 | 1 | |
| 127A-182 | Amended | 281 | 1 | |
| 127A-184 | Amended | 281 | 1 | |
| 127A-191 | Amended | 281 | 1 | |
| 128-21 | Amended | 66 | 2 | |
| 128-21 | Amended | 66 | 6 | |
| 128-21 | Amended | 66 | 6 | |
| 128-24 | Amended | 66 | 3 | |
| 128-24 | Amended | 66 | 8 | |
| 128-24 | Amended | 66 | 12 | |
| 128-26 | Amended | 281 | 1 | |
| 128-27 | Amended | 66 | 3 | |
| 128-27 | Amended | 66 | 3 | |
| 128-27 | Amended | 66 | 5 | |
| 128-27 | Amended | 66 | 6 | |
| 128-27 | Amended | 66 | 11 | |
| 128-27 | Amended | 66 | 12 | |

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| 128-27 | Amended | 109 | 2 | |
| 128-30 | Amended | 66 | 7 | |
| 128-32.1 | Amended | 66 | 4 | |
| 128-38.2 | Amended | 66 | 1 | |
| 130A-1.1 | Amended | 442 | 1 | |
| 130A-22 | Amended | 27 | 2 | 1/2/10 |
| 130A-22 | Amended | 163 | 2 | |
| 130A-22 | Amended | 488 | 2 | |
| 130A-35 | Amended | 447 | 1 | |
| 130A-49.5 | Added | 403 | 6 | |
| 130A-64.1 | Added | 436 | 3 | |
| 130A-93.1 | Amended | 451 | 10.22 | |
| 130A-101 | Amended | 285 | 1 | |
| 130A-128.1 | Amended | 570 | 43.1 | |
| 130A-128.1 | Added | 67 | 1 | |
| 130A-131.8 | Amended | 484 | 1 | |
| 130A-144 | Amended | 501 | 2 | |
| 130A-153 | Amended | 451 | 10.29A | |
| 130A-184 | Amended | 304 | 2 | |
| 130A-184 | Amended | 327 | 1 | |
| 130A-185 | Amended | 327 | 2 | |
| 130A-187 | Amended | 327 | 3 | |
| 130A-188 | Repealed | 327 | 4 | |
| 130A-189 | Amended | 327 | 5 | |
| 130A-190 | Amended | 327 | 6 | |
| 130A-192 | Amended | 304 | 1 | |
| 130A-192 | Amended | 327 | 7 | |
| 130A-193 | Amended | 327 | 8 | |
| 130A-194 | Amended | 327 | 9 | |
| 130A-195 | Amended | 327 | 10 | |
| 130A-196 | Amended | 327 | 11 | |
| 130A-197 | Amended | 327 | 12 | |
| 130A-198 | Amended | 327 | 13 | |
| 130A-199 | Amended | 327 | 14 | |
| 130A-216 | Added | 502 | 1 | |
| 130A-248 | Amended | 451 | 13.2 | |
| 130A-248 | Amended | 484 | 2 | |
| 130A-295.02 | Amended | 570 | 16 | |
| 130A-295.9 | Amended | 451 | 13.3E | |
| 130A-303 | Amended | 570 | 27 | |
| 130A-309.09A | Amended | 484 | 16 | |
| 130A-309.09A | Amended | 550 | 10 | |
| 130A-309.10 | Amended | 499 | 1 | |
| 130A-309.10 | Amended | 550 | 10 | |
| 130A-309.12 | Amended | 451 | 13.3A | |
| 130A-309.54 | Amended | 451 | 13.3B | |
| 130A-309.90 | Amended | 484 | 16 | |
| 130A-309.90 | Amended | 550 | 10 | |
| 130A-309.91 | Amended | 484 | 16 | |
| 130A-309.91 | Amended | 550 | 10 | |
| 130A-309.92 | Amended | 484 | 16 | |
| 130A-309.92 | Amended | 550 | 10 | |
| 130A-309.93A | Amended | 484 | 16 | |
| 130A-309.93A | Amended | 550 | 10 | |
| 130A-309.93B | Amended | 484 | 16 | |
| 130A-309.93B | Amended | 550 | 10 | |
| 130A-309.93 | Amended | 484 | 16 | |
| 130A-309.93 | Amended | 550 | 10 | |
| 130A-309.94 | Amended | 484 | 16 | |

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| 130A-309.94 | Amended | 550 | 10 | |
| 130A-309.95 | Amended | 484 | 16 | |
| 130A-309.95 | Amended | 550 | 10 | |
| 130A-309.96 | Amended | 484 | 16 | |
| 130A-309.96 | Amended | 550 | 10 | |
| 130A-309.97 | Amended | 484 | 16 | |
| 130A-309.97 | Amended | 550 | 10 | |
| 130A-309.98 | Amended | 484 | 16 | |
| 130A-309.98 | Amended | 550 | 10 | |
| 130A-309.120 | Added | 163 | 1 | |
| 130A-309.121 | Added | 163 | 1 | |
| 130A-309.122 | Added | 163 | 1 | |
| 130A-309.123 | Added | 163 | 1 | |
| 130A-309.124 | Added | 163 | 1 | |
| 130A-309.125 | Added | 163 | 1 | |
| 130A-310.9 | Amended | 451 | 13.3C | |
| 130A-310.11 | Amended | 484 | 11 | |
| 130A-310.34 | Amended | 181 | 1 | |
| 130A-433 | Amended | 451 | 10.29A | |
| 130A-453.22 | Added | 488 | 1 | |
| 130A-453.23 | Added | 488 | 1 | |
| 130A-453.24 | Added | 488 | 1 | |
| 130A-453.25 | Added | 488 | 1 | |
| 130A-453.26 | Added | 488 | 1 | |
| 130A-453.27 | Added | 488 | 1 | |
| 130A-453.28 | Added | 488 | 1 | |
| 130A-453.29 | Added | 488 | 1 | |
| 130A-453.30 | Added | 488 | 1 | |
| 130A-453.31 | Added | 488 | 1 | |
| 130A-491 | Amended | 27 | 1 | 1/2/10 |
| 130A-491 | Amended | 27 | 1 | 1/2/10 |
| 130A-492 | Amended | 27 | 1 | 7/2/10 |
| 130A-492 | Amended | 550 | 6 | |
| 130A-493 | Amended | 27 | 1 | 1/2/10 |
| 130A-493 | Added | 27 | 1 | 1/2/10 |
| 130A-496 | Added | 27 | 1 | 1/2/10 |
| 130A-497 | Added | 27 | 1 | 1/2/10 |
| 130A-498 | Amended | 27 | 1 | 1/2/10 |
| 130A-499 | Amended | 27 | 1 | 1/2/10 |
| 131D-1 | Amended | 188 | 1 | |
| 131D-1 | Amended | 462 | 1 | |
| 131D-2 | Amended | 232 | 1 | |
| 131D-2 | Amended | 451 | 10.76 | |
| 131D-2 | Amended | 462 | 3 | |
| 131D-2 | Repealed | 462 | 1 | |
| 131D-2.1 | Amended | 462 | 3 | |
| 131D-2.1 | Added | 462 | 1 | |
| 131D-2.2 | Added | 462 | 1 | |
| 131D-2.3 | Added | 462 | 1 | |
| 131D-2.4 | Added | 462 | 1 | |
| 131D-2.5 | Amended | 451 | 10.76 | |
| 131D-2.5 | Amended | 462 | 3 | |
| 131D-2.5 | Added | 462 | 1 | |
| 131D-2.6 | Added | 462 | 1 | |
| 131D-2.7 | Added | 462 | 1 | |
| 131D-2.8 | Added | 462 | 1 | |
| 131D-2.11 | Amended | 232 | 3 | |
| 131D-2.11 | Added | 462 | 1 | |
| 131D-2.12 | Added | 462 | 1 | |

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| 131D-2.13 | Added | 462 | 1 | |
| 131D-2.14 | Added | 462 | 1 | |
| 131D-2.15 | Added | 462 | 1 | |
| 131D-2.16 | Added | 462 | 1 | |
| 131D-2.17 | Added | 462 | 1 | |
| 131D-2.18 | Added | 462 | 1 | |
| 131D-4.6 | Amended | 462 | 4 | |
| 131D-10.1 | Amended | 408 | 1 | |
| 131D-10.5 | Amended | 188 | 2 | |
| 131D-10.10 | Amended | 462 | 1 | |
| 131D-10.10 | Added | 462 | 1 | |
| 131D-19 | Amended | 462 | 4 | |
| 131D-20 | Amended | 462 | 4 | |
| 131D-29 | Amended | 462 | 4 | |
| 131D-41 | Repealed | 462 | 2 | |
| 131D-42 | Repealed | 462 | 2 | |
| 131E-76 | Amended | 462 | 4 | |
| 131E-76 | Amended | 487 | 4 | |
| 131E-77 | Amended | 451 | 10.76 | |
| 131E-80 | Amended | 487 | 4 | |
| 131E-102 | Amended | 451 | 10.76 | |
| 131E-138 | Amended | 451 | 10.76 | |
| 131E-147 | Amended | 451 | 10.76 | |
| 131E-167 | Amended | 451 | 10.76 | |
| 131E-176 | Amended | 145 | 2 | |
| 131E-176 | Amended | 462 | 4 | |
| 131E-184 | Amended | 145 | 1 | |
| 131E-184 | Amended | 487 | 3 | |
| 131E-187 | Amended | 373 | 1 | |
| 131E-188 | Amended | 373 | 2 | |
| 131E-191.1 | Added | 477 | 2 | |
| 131E-202 | Amended | 451 | 10.76 | |
| 131E-231 | Amended | 462 | 4 | |
| 131E-256 | Amended | 316 | 1 | |
| 131E-256 | Amended | 316 | 1 | |
| 131E-256 | Amended | 316 | 2 | |
| 131E-256 | Amended | 462 | 4 | |
| 131E-272 | Added | 451 | 10.77 | |
| 132-1.2 | Amended | 346 | 1 | |
| 132-1.10 | Amended | 355 | 3 | |
| 135-1 | Amended | 11 | 1 | |
| 135-1 | Amended | 66 | 6 | |
| 135-1 | Amended | 281 | 1 | |
| 135-1 | Amended | 451 | 26.22 | |
| 135-3 | Amended | 66 | 8 | |
| 135-3 | Amended | 66 | 12 | |
| 135-3 | Amended | 137 | 1 | |
| 135-4 | Amended | 281 | 1 | |
| 135-5 | Amended | 66 | 3 | |
| 135-5 | Amended | 66 | 3 | |
| 135-5 | Amended | 66 | 5 | |
| 135-5 | Amended | 66 | 6 | |
| 135-5 | Amended | 66 | 9 | |
| 135-5 | Amended | 66 | 11 | |
| 135-5 | Amended | 66 | 12 | |
| 135-5 | Amended | 109 | 1 | |
| 135-8 | Amended | 66 | 7 | |
| 135-10.1 | Amended | 66 | 4 | |
| 135-18.7 | Amended | 66 | 1 | |

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| 135-43 | Amended | 16 | 5 |  |
| 135-43 | Amended | 83 | 1 |  |
| 135-44.1 | Amended | 16 | 5 |  |
| 135-44.4 | Amended | 16 | 5 |  |
| 135-44.6 | Amended | 281 | 1 |  |
| 135-44.6 | Amended | 571 | 3 |  |
| 135-45 | Amended | 16 | 2 |  |
| 135-45 | Amended | 16 | 5 |  |
| 135-45 | Amended | 281 | 1 |  |
| 135-45 | Amended | 313 | 2 |  |
| 135-45.1 | Amended | 16 | 3 |  |
| 135-45.1 | Amended | 281 | 1 |  |
| 135-45.2 | Amended | 16 | 3 |  |
| 135-45.2 | Amended | 281 | 1 |  |
| 135-45.2 | Amended | 570 | 43.2 |  |
| 135-45.2 | Amended | 571 | 3 |  |
| 135-45.2 | Amended | 571 | 3 |  |
| 135-45.3 | Amended | 16 | 3 |  |
| 135-45.3 | Amended | 281 | 1 |  |
| 135-45.4 | Amended | 16 | 3 |  |
| 135-45.4 | Amended | 281 | 1 |  |
| 135-45.6 | Amended | 16 | 2 |  |
| 135-45.6 | Amended | 571 | 3 |  |
| 135-45.8 | Amended | 16 | 2 |  |
| 135-45.12 | Amended | 16 | 3 |  |
| 135-53 | Amended | 66 | 6 |  |
| 135-57 | Amended | 66 | 3 |  |
| 135-57 | Amended | 66 | 12 |  |
| 135-59 | Amended | 66 | 3 |  |
| 135-63 | Amended | 66 | 6 |  |
| 135-63 | Amended | 66 | 11 |  |
| 135-64 | Amended | 66 | 11 |  |
| 135-74 | Amended | 66 | 1 |  |
| 135-96 | Amended | 378 | 1 |  |
| 136 | Amended | 266 | 4 |  |
| 136-5.1 | Added | 266 | 5 |  |
| 136-17.2A | Amended | 497 | 1 |  |
| 136-18 | Amended | 266 | 6 |  |
| 136-18 | Amended | 451 | 25.6 |  |
| 136-18.5C | Added | 198 | 1 |  |
| 136-19 | Amended | 266 | 7 |  |
| 136-19.3 | Amended | 266 | 8 |  |
| 136-19.5 | Amended | 266 | 9 |  |
| 136-26 | Amended | 266 | 10 |  |
| 136-27.1 | Amended | 266 | 11 |  |
| 136-27.2 | Amended | 266 | 12 |  |
| 136-28.1 | Amended | 266 | 1 |  |
| 136-28.1 | Amended | 475 | 12 |  |
| 136-28.2 | Amended | 266 | 13 |  |
| 136-28.4 | Amended | 266 | 3 |  |
| 136-28.6A | Added | 235 | 1 |  |
| 136-28.6 | Amended | 266 | 14 |  |
| 136-28.9 | Amended | 266 | 15 |  |
| 136-28.10 | Amended | 266 | 2 |  |
| 136-29 | Amended | 266 | 16 |  |
| 136-34.1 | Added | 332 | 3 |  |
| 136-35 | Amended | 266 | 17 |  |
| 136-44.1 | Amended | 266 | 18 |  |
| 136-44.2C | Amended | 266 | 20 |  |

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| 136-44.2 | Amended | 266 | 19 | |
| 136-44.4 | Amended | 266 | 21 | |
| 136-44.20 | Amended | 409 | 1 | |
| 136-44.50 | Amended | 332 | 1 | |
| 136-44.50 | Amended | 332 | 2 | |
| 136-44.50 | Amended | 570 | 44 | |
| 136-66.1 | Amended | 266 | 22 | |
| 136-66.3 | Amended | 266 | 23 | |
| 136-66.5 | Amended | 266 | 24 | |
| 136-89.182 | Amended | 343 | 1 | |
| 136-89.182 | Amended | 343 | 2 | |
| 136-89.189 | Amended | 56 | 2 | |
| 136-102.2 | Amended | 266 | 25 | |
| 136-102.8 | Added | 310 | 1 | |
| 136-103.1 | Amended | 266 | 26 | |
| 136-176 | Amended | 56 | 1 | |
| 136-177 | Amended | 266 | 27 | |
| 136-250 | Added | 527 | 1 | |
| 136-251 | Added | 527 | 1 | |
| 136-252 | Added | 527 | 1 | |
| 136-253 | Added | 527 | 1 | |
| 136-254 | Added | 527 | 1 | |
| 136-255 | Added | 527 | 1 | |
| 136-256 | Added | 527 | 1 | |
| 138A-10 | Amended | 549 | 8 | |
| 138A-12 | Amended | 549 | 9 | |
| 138A-12 | Amended | 549 | 10 | |
| 138A-12 | Amended | 549 | 11 | |
| 138A-13 | Amended | 570 | 17 | |
| 138A-14 | Amended | 10 | 4 | |
| 138A-14 | Amended | 549 | 12 | |
| 138A-22 | Amended | 549 | 13 | |
| 138A-24 | Amended | 549 | 14 | |
| 138A-24 | Amended | 570 | 45 | |
| 138A-25 | Amended | 549 | 15 | |
| 138A-31 | Amended | 549 | 16 | |
| 138A-32 | Amended | 549 | 17 | |
| 142-63 | Amended | 375 | 1 | |
| 143-47.7 | Amended | 549 | 18 | |
| 143-48.4 | Amended | 243 | 2 | |
| 143-52 | Amended | 475 | 1 | |
| 143-53 | Amended | 475 | 2 | |
| 143-53.1 | Amended | 475 | 5 | |
| 143-54 | Amended | 475 | 6 | |
| 143-55 | Amended | 475 | 7 | |
| 143-56 | Amended | 184 | 1 | |
| 143-58.2 | Amended | 484 | 15 | |
| 143-58.4 | Amended | 237 | 1 | |
| 143-58.4 | Amended | 446 | 1 | |
| 143-58.5 | Amended | 237 | 2 | |
| 143-64.11 | Amended | 446 | 1 | |
| 143-64.12 | Amended | 446 | 1 | |
| 143-64.17B | Amended | 375 | 2 | |
| 143-64.17F | Amended | 446 | 1 | |
| 143-64.17G | Amended | 375 | 3 | |
| 143-64.17H | Amended | 446 | 1 | |
| 143-128.4 | Amended | 243 | 3 | |
| 143-129.8A | Added | 329 | 1.1 | |
| 143-135.9 | Amended | 329 | 1.2 | |

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| 143-138 | Amended | 79 | 1 | |
| 143-138 | Amended | 243 | 1 | |
| 143-138 | Amended | 532 | 1 | |
| 143-138 | Amended | 570 | 18 | |
| 143-139 | Amended | 474 | 3 | |
| 143-139 | Amended | 474 | 4 | |
| 143-143.11 | Amended | 451 | 21.4 | |
| 143-151.16 | Amended | 451 | 21.3 | |
| 143-151.45 | Amended | 509 | 3.3 | 10/1/13 |
| 143-151.49 | Amended | 509 | 2.1 | 10/1/11 |
| 143-151.50 | Amended | 509 | 3.4 | 10/1/13 |
| 143-151.51 | Amended | 509 | 2.2 | 10/1/11 |
| 143-151.52 | Repealed | 509 | 3.3 | 10/1/13 |
| 143-151.54 | Amended | 509 | 5.1 | |
| 143-151.55 | Amended | 509 | 2.3 | 10/1/11 |
| 143-151.55 | Amended | 509 | 3.5 | 10/1/13 |
| 143-151.55 | Amended | 509 | 5.2 | |
| 143-151.56 | Amended | 509 | 2.4 | 10/1/11 |
| 143-151.57 | Amended | 451 | 21.8 | |
| 143-151.57 | Amended | 509 | 3.6 | 10/1/13 |
| 143-151.57 | Amended | 509 | 5.3 | |
| 143-151.58 | Amended | 509 | 2.5 | 10/1/11 |
| 143-151.58 | Amended | 509 | 3.3 | 10/1/13 |
| 143-151.58 | Amended | 509 | 3.7 | 10/1/13 |
| 143-151.58 | Amended | 509 | 4.1 | |
| 143-151.58 | Amended | 509 | 4.2 | |
| 143-151.61 | Repealed | 509 | 3.3 | 10/1/13 |
| 143-151.64 | Amended | 509 | 1.1 | |
| 143-166.42 | Amended | 396 | 1 | |
| 143-214.7A | Added | 322 | 1 | |
| 143-214.11 | Amended | 337 | 1 | |
| 143-214.20 | Amended | 337 | 2 | |
| 143-214.26 | Added | 337 | 4 | |
| 143-215.9C | Added | 478 | 1 | |
| 143-215.10C | Amended | 92 | 1 | |
| 143-215.17 | Amended | 134 | 1 | |
| 143-215.25A | Amended | 390 | 3 | |
| 143-215.94H | Amended | 570 | 19 | |
| 143-215.94T | Amended | 570 | 20 | |
| 143-215.104A | Amended | 483 | 5 | |
| 143-215.104A | Amended | 483 | 7 | |
| 143-215.104I | Amended | 483 | 1 | |
| 143-215.104K | Amended | 483 | 2 | |
| 143-215.104L | Amended | 483 | 3 | |
| 143-215.104N | Amended | 483 | 4 | |
| 143-260.10 | Amended | 503 | 1 | |
| 143-299.1A | Amended | 570 | 21 | |
| 143-318.12 | Amended | 350 | 1 | |
| 143-340 | Amended | 451 | 17.3 | |
| 143-341 | Amended | 241 | 1 | 7/1/10 |
| 143-341 | Amended | 474 | 5 | |
| 143-341.1 | Repealed | 451 | 17.3 | |
| 143-345.10 | Added | 262 | 1 | |
| 143-345.11 | Added | 474 | 2 | |
| 143-345.16 | Amended | 475 | 13 | |
| 143-345.18 | Amended | 446 | 1 | |
| 143-345.18 | Amended | 475 | 13 | |
| 143-355.2 | Amended | 480 | 1 | |
| 143-433.6 | Amended | 140 | 2 | |

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| 143-433.8 | Amended | 140 | 3 | |
| 143-433.9 | Amended | 140 | 4 | |
| 143-442 | Amended | 451 | 11.2 | |
| 143-509 | Amended | 363 | 1 | |
| 143-548 | Amended | 570 | 8 | |
| 143-655 | Amended | 451 | 17.7 | |
| 143-745 | Amended | 516 | 2 | |
| 143A-239 | Amended | 281 | 1 | |
| 143B-30.1 | Amended | 451 | 21A.2 | |
| 143B-147 | Amended | 187 | 1 | |
| 143B-147 | Amended | 490 | 6 | |
| 143B-152.1 | Repealed | 451 | 18.6 | |
| 143B-152.2 | Repealed | 451 | 18.6 | |
| 143B-152.3 | Repealed | 451 | 18.6 | |
| 143B-152.4 | Repealed | 451 | 18.6 | |
| 143B-152.5 | Repealed | 451 | 18.6 | |
| 143B-152.6 | Repealed | 451 | 18.6 | |
| 143B-152.7 | Repealed | 451 | 18.6 | |
| 143B-168.12 | Amended | 451 | 20C.1 | |
| 143B-168.14 | Amended | 451 | 20C.1 | |
| 143B-181.21 | Amended | 462 | 4 | |
| 143B-216.65 | Amended | 361 | 3 | |
| 143B-216.66 | Amended | 361 | 3 | |
| 143B-262 | Amended | 372 | 6 | |
| 143B-262.4 | Amended | 372 | 17 | |
| 143B-262.4 | Amended | 411 | 2 | |
| 143B-262.4 | Amended | 451 | 19.26 | |
| 143B-262.4 | Amended | 451 | 19.26 | |
| 143B-262.4 | Amended | 575 | 16A | |
| 143B-273.4 | Amended | 349 | 1 | |
| 143B-273.8 | Amended | 349 | 2.1 | |
| 143B-273.10 | Amended | 372 | 18 | |
| 143B-273.14 | Amended | 349 | 2 | |
| 143B-279.2 | Amended | 451 | 13.1A | |
| 143B-394.15 | Amended | 342 | 1 | |
| 143B-407 | Amended | 39 | 1 | |
| 143B-434.1 | Amended | 550 | 7 | |
| 143B-434.1 | Amended | 570 | 8 | |
| 143B-437.01 | Amended | 523 | 1 | |
| 143B-437.01 | Amended | 523 | 1 | |
| 143B-437.02 | Amended | 451 | 14.5 | |
| 143B-437.08 | Amended | 505 | 1 | |
| 143B-437.08 | Amended | 524 | 1 | |
| 143B-437.011 | Amended | 451 | 14.7 | |
| 143B-437.012 | Amended | 451 | 14.5 | |
| 143B-437.012 | Amended | 520 | 1 | 7/1/10 |
| 143B-437.52 | Amended | 394 | 1 | |
| 143B-437.55 | Amended | 394 | 2 | |
| 143B-437.57 | Amended | 394 | 3 | |
| 143B-437.58 | Amended | 394 | 4 | |
| 143B-437.59 | Amended | 394 | 5 | |
| 143B-437.62 | Amended | 394 | 6 | |
| 143B-437.63 | Amended | 445 | 40 | |
| 143B-437.63 | Amended | 570 | 22 | |
| 143B-437.83 | Amended | 451 | 14.5 | |
| 143B-438.13 | Amended | 451 | 14.5 | |
| 143B-438.17 | Amended | 451 | 14.5 | |
| 143B-472.35 | Amended | 451 | 14.10 | |
| 143B-472.80 | Amended | 451 | 14.5 | |

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| 143B-472.121 | Amended | 446 | 2 | |
| 143B-472.122 | Amended | 446 | 2 | |
| 143B-472.123 | Amended | 446 | 2 | |
| 143B-474 | Amended | 281 | 1 | |
| 143B-475 | Amended | 397 | 1 | |
| 143B-475 | Amended | 451 | 17.3 | |
| 143B-475.2 | Added | 451 | 17.5 | |
| 143B-476 | Amended | 451 | 17.3 | |
| 143B-480.1 | Amended | 354 | 1 | |
| 143B-480.2 | Repealed | 354 | 1 | |
| 143B-480.3 | Amended | 354 | 2 | |
| 143B-499.8 | Amended | 143 | 1 | |
| 143B-508 | Added | 81 | 3 | |
| 143B-509 | Added | 397 | 3 | |
| 143B-509.1 | Added | 451 | 17.3 | |
| 143B-535 | Amended | 320 | 1 | |
| 143C-6-4 | Amended | 281 | 1 = | |
| 144-3 | Amended | 570 | 23 | |
| 145-30 | Added | 24 | 1 | 5/13/09 |
| 146-30 | Amended | 376 | 15 | |
| 146-64 | Amended | 484 | 10 | |
| 147-12 | Amended | 281 | 1 | |
| 147-33.93 | Amended | 136 | 1 | |
| 147-33.95 | Amended | 451 | 6.14A | |
| 147-33.104 | Amended | 484 | 16 | |
| 147-33.104 | Amended | 550 | 10 | |
| 147-64.6 | Amended | 136 | 2 | |
| 147-69.2 | Amended | 98 | 1 | |
| 147-69.2 | Amended | 283 | 2 | |
| 147-69.2 | Amended | 451 | 25.2 | |
| 147-69.7 | Added | 283 | 3 | |
| 147-69.8 | Added | 283 | 4 | |
| 147-86.2 | Added | 136 | 3 | |
| 148-23.1 | Amended | 560 | 1 | 3/1/10 |
| 148-23.2 | Added | 560 | 2 | 3/1/10 |
| 148-32.1 | Amended | 451 | 19.22A | |
| 148-32.2 | Added | 451 | 19.24 | |
| 148-84 | Amended | 570 | 24 | |
| 148-132 | Amended | 451 | 19.16 | |
| 150B-1 | Amended | 445 | 41 | |
| 150B-1 | Amended | 475 | 4 | |
| 150B-1 | Amended | 523 | 2 | |
| 150B-21.1B | Added | 475 | 3 | |
| 150B-23 | Amended | 451 | 21A.1 | |
| 150B-23.2 | Added | 451 | 21A.1 | |
| 150B-36 | Amended | 51 | 1 | |
| 153A-27.1 | Amended | 32 | 1 | |
| 153A-53 | Added | 403 | 4 | |
| 153A-93 | Amended | 564 | 1 | |
| 153A-93 | Amended | 564 | 2 | |
| 153A-102.1 | Added | 436 | 1 | |
| 153A-140.2 | Added | 287 | 2 | |
| 153A-144 | Amended | 553 | 2 | |
| 153A-149 | Amended | 281 | 1 | |
| 153A-155 | Amended | 112 | 4 | |
| 153A-155 | Amended | 157 | 2 | |
| 153A-155 | Amended | 297 | 3 | |
| 153A-210.2 | Amended | 525 | 1 | |
| 153A-210.4 | Amended | 525 | 1 | |

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| | | Chapter | Section | |
| 153A-210.7 | Added | 525 | 1 | |
| 153A-230.2 | Amended | 372 | 7 | |
| 153A-245 | Added | 459 | 1 | |
| 153A-277 | Amended | 302 | 2 | |
| 153A-312 | Amended | 523 | 3 | |
| 153A-313 | Amended | 523 | 3 | |
| 153A-317 | Amended | 523 | 3 | |
| 153A-317 | Amended | 527 | 6 | |
| 153A-336 | Added | 421 | 2 | |
| 153A-343 | Amended | 178 | 1 | |
| 153A-345 | Amended | 421 | 6 | |
| 153A-349 | Added | 421 | 1 | |
| 153A-357 | Amended | 117 | 1 | |
| 153A-357 | Amended | 532 | 2 | |
| 153A-455 | Added | 522 | 2 | |
| 153B | Added | 485 | 1 | |
| 153B-1 | Added | 485 | 1 | |
| 153B-2 | Added | 485 | 1 | |
| 153B-3 | Added | 485 | 1 | |
| 153B-4 | Added | 485 | 1 | |
| 157-9.1 | Amended | 218 | 1 | |
| 159C-3 | Amended | 140 | 6 | |
| 159C-6 | Amended | 140 | 7 | |
| 159D-3 | Amended | 140 | 8 | |
| 159D-45 | Amended | 140 | 9 | |
| 159-48 | Amended | 281 | 1 | |
| 159-81 | Amended | 527 | 2 | |
| 159-111 | Amended | 525 | 3 | |
| 159-123 | Amended | 140 | 5 | |
| 160A-4.1 | Added | 436 | 2 | |
| 160A-20 | Amended | 527 | 2 | |
| 160A-23.1 | Amended | 414 | 1 | |
| 160A-38 | Amended | 570 | 27 | |
| 160A-50 | Amended | 570 | 27 | |
| 160A-58.1 | Amended | 40 | 2 | |
| 160A-58.1 | Amended | 53 | 1 | |
| 160A-58.1 | Amended | 111 | 1 | |
| 160A-58.1 | Amended | 156 | 1 | |
| 160A-58.1 | Amended | 298 | 1 | |
| 160A-58.1 | Amended | 323 | 1 | |
| 160A-86 | Added | 403 | 1 | |
| 160A-87 | Added | 403 | 1 | |
| 160A-147 | Amended | 321 | 1 | |
| 160A-200 | Amended | 3 | 1 | |
| 160A-200 | Amended | 19 | 1 | |
| 160A-200 | Amended | 570 | 46 | |
| 160A-200.1 | Added | 287 | 1 | |
| 160A-201 | Amended | 553 | 1 | |
| 160A-215 | Amended | 169 | 8 | |
| 160A-215 | Amended | 291 | 2 | |
| 160A-215 | Amended | 428 | 4 | |
| 160A-215 | Amended | 429 | 8 | |
| 160A-215.2 | Amended | 445 | 27 | |
| 160A-239.2 | Amended | 525 | 2 | |
| 160A-239.4 | Amended | 525 | 2 | |
| 160A-239.7 | Added | 525 | 2 | |
| 160A-280 | Amended | 141 | 1 | |
| 160A-280 | Amended | 141 | 2 | |
| 160A-280 | Amended | 141 | 3 | |

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| 160A-300.5 | Repealed | 459 | 2 | |
| 160A-300.6 | Added | 459 | 3 | |
| 160A-303 | Amended | 97 | 1 | |
| 160A-303.2 | Amended | 97 | 2 | |
| 160A-314 | Amended | 302 | 3 | |
| 160A-377 | Added | 421 | 2 | |
| 160A-383.4 | Amended | 95 | 1 | |
| 160A-384 | Amended | 178 | 2 | |
| 160A-388 | Amended | 421 | 5 | |
| 160A-393 | Added | 421 | 1 | |
| 160A-400.4 | Amended | 553 | 4 | |
| 160A-417 | Amended | 532 | 3 | |
| 160A-425.1 | Amended | 9 | 1 | |
| 160A-425.1 | Repealed | 263 | 1 | |
| 160A-426 | Amended | 263 | 2 | |
| 160A-428 | Amended | 263 | 4 | |
| 160A-432 | Amended | 9 | 2 | |
| 160A-432 | Amended | 263 | 1 | |
| 160A-432 | Amended | 263 | 3 | |
| 160A-443 | Amended | 279 | 7 | |
| 160A-459.1 | Added | 522 | 1 | |
| 160A-460 | Amended | 527 | 2 | |
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| 160B-2.3 | Added | 403 | 5 | |
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| 161-10 | Amended | 451 | 20A.4 | |
| 161-11.2 | Amended | 451 | 20A.4 | |
| 161-11.3 | Amended | 451 | 17.8 | |
| 161-11.5 | Added | 451 | 17.8 | |
| 161-11.6 | Added | 451 | 20B.3 | |
| 161-31 | Amended | 290 | 1 | |
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| 163-22 | Amended | 537 | 10 | |
| 163-22 | Amended | 541 | 1 | |
| 163-33 | Amended | 541 | 2 | |
| 163-35 | Amended | 541 | 3 | |
| 163-35 | Amended | 541 | 4 | |
| 163-55 | Amended | 541 | 5 | |
| 163-59 | Amended | 541 | 6 | |
| 163-82.1 | Amended | 541 | 7 | |
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| 163-82.6A | Amended | 541 | 11 | |
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| 163-82.10 | Amended | 541 | 12 | |
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| 163-82.23 | Amended | 541 | 15 | |
| 163-82.25 | Amended | 541 | 16 | |
| 163-85 | Amended | 526 | 1.2 | |
| 163-85 | Amended | 541 | 16.1 | |
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| 163-165.9 | Amended | 541 | 20 | |
| 163-166.1 | Amended | 541 | 21 | |
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| 163-182.14 | Amended | 541 | 27 | |
| 163-209 | Amended | 96 | 2 | |
| 163-209.1 | Added | 96 | 3 | |
| 163-209.2 | Added | 96 | 1 | |
| 163-227.2 | Amended | 541 | 23 | |
| 163-227.3 | Amended | 537 | 2 | |
| 163-228 | Amended | 537 | 3 | |
| 163-229 | Amended | 537 | 4 | |
| 163-230.1 | Amended | 537 | 5 | |
| 163-231 | Amended | 537 | 6 | |
| 163-231 | Amended | 537 | 8 | |
| 163-232.1 | Added | 537 | 8 | |
| 163-234 | Amended | 537 | 8 | |
| 163-245 | Amended | 281 | 1 | |
| 163-248 | Amended | 537 | 1 | |
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| 163-258 | Added | 537 | 9 | |
| 163-278.5 | Amended | 534 | 6 | |
| 163-278.6 | Amended | 534 | 1 | |
| 163-278.6 | Amended | 534 | 3 | |
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| 163-278.66 | Amended | 570 | 25 | |
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| 163-278.67 | Amended | 543 | 5 | |
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| 163-278.84 | Added | 534 | 7 | |
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| 163-278.103 | Added | 534 | 9 | |
| 163-278.110 | Amended | 534 | 10 | |
| 163-278.113 | Added | 534 | 10 | |
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| 163-278.301 | Amended | 534 | 2 | |
| 163-278.307 | Amended | 534 | 2 | |
| 163-278.308 | Amended | 534 | 2 | |
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| 166A-4 | Amended | 193 | 2 | |
| 166A-4 | Amended | 397 | 2 | |
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| 166A-5 | Amended | 193 | 3 | |
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| 166A-5 | Amended | 225 | 1 | |
| 166A-6.03 | Added | 195 | 1 | |
| 166A-7 | Amended | 196 | 2 | |
| 166A-7 | Amended | 225 | 2 | |
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| 166A-14 | Amended | 146 | 2 | |
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